

# Redacted Protest

OLES MORRISON

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[REDACTED]

July 26, 2019

**VIA EPDS**

General Counsel  
Government Accountability Office  
441 G Street, NW  
Washington, D.C. 20548

ATTN: Procurement Law Control Group

**Re: Protest of Leupold Stevens, Inc.  
Department of the Navy Surface Warfare Center Crane Division  
Solicitation Number N00164-18-R-JQ30  
Award Number N00164-18-D-JQ30  
Squad-Variable Power Scope**

Dear GAO Attorney:

Leupold Stevens, Inc. (“LSI”),<sup>1</sup> by and through its undersigned counsel, hereby timely protests the U.S. Department of the Navy Surface Warfare Center Crane Division’s (the “Agency” or “Navy”) contract modification to the internal reticle under Solicitation No. N00164-18-R-JQ30 (“the Solicitation”) and Contract No. N00164-18-D-JQ30 (“the Contract”) for Squad-Variable Power Scopes to Sig Sauer, Inc. (“Sig Sauer”).

As discussed further below, the Agency improperly modified its contract with Sig Sauer. The changes made to the Contract were so substantial that the contract should be terminated and a new competition conducted for the modified requirements. Further, the Agency’s justifications for not competing the requirement were incorrect and therefore arbitrary and capricious.

**I. LSI’S PROTEST IS TIMELY**

The Agency published the notice of contract modification to the U.S. Department of Defense Daily Digest Bulletin on July 17, 2019.<sup>2</sup> LSI learned of the basis for its protest

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<sup>1</sup> LSI’s phone number is 503-526-5182; email address is (Mark Kowalski) mkowalski@leupold.com; and physical and mailing address is 1440 NW Greenbrier Pkwy Beaverton, OR 97006-5790.

<sup>2</sup> Exhibit A.

pursuant to this July 17, 2019 posting. Accordingly, this protest is timely filed within ten days of when LSI knew or should have known the basis for its protest. See 4 C.F.R. § 21.2(a)(2).

## II. LSI IS AN INTERESTED PARTY

An “[i]nterested party means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” 4 C.F.R. § 21.0(a)(1). “Whether a protester is an interested party is determined by the nature of the issues raised and direct or indirect benefit or relief sought.” *Coulson Aviation (USA), Inc.*, B-411306 *et al.*, July 8, 2015, 2015 CPD ¶ 214 at 8.

LSI was an actual bidder on the Solicitation and is therefore an interested party for the purposes of filing this Protest. LSI specializes in rifles and rifle scopes and has held multiple contracts with the Department of Defense to provide scopes to various defense agencies. LSI has suffered a non-trivial competitive injury as a result of the Agency’s improper contract modification. As a result of the Agency’s actions, LSI was improperly eliminated from the competition. Therefore, LSI has a direct economic interest in this matter and is an interested party for the purpose of filing this protest. See 4 C.F.R. § 21.0.

## III. BACKGROUND

### A. **Leupold Stevens, Inc.**

LSI based in the United States is a rifle and optic sight contractor that was founded in 1907 and employs over 700+ American workers. All Leupold riflescopes are designed, machined, assembled, and tested in Leupold’s 160,200 sq. ft. state of the art manufacturing facility in Beaverton, Oregon, USA. During its 112-year history, LSI has proudly provided high quality rifles and sights to the Government, Law Enforcement Agencies and Consumer Markets.

### B. **The Prior Solicitation**

On November 9, 2017, the Agency issued the Solicitation to purchase “the Miniature Aiming Systems – Day Optics (MAS-D) Squad – Variable Power Scope (S-VPS).”<sup>3</sup> The Solicitation contained a minimum quantity purchase of 32 and a maximum contract value of \$33,250,000 for First Focal Plane S-VPSs and Second Focal Plane S-VPSs.<sup>4</sup> Specifically, “[t]he S-VPS includes a non-caliber specific reticle, is variable power,

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<sup>3</sup> Exhibit B at 1 at p. 2.

<sup>4</sup> Exhibit C at p. 2.

and incorporates an illuminated aim-point.”<sup>5</sup> <sup>6</sup> The Solicitation further required that “[t]here shall be no changes to the S-VPS Scope design when changing to a new reticle, other than the reticle itself.”<sup>7</sup> In addition, “[t]he vendor shall allow for future reticle designs and operational needs to include in the Dayscope: Mil Dot, Milliradian Line, Ballistic, Velocity, and Grid hybrids.”<sup>8</sup>

LSI, Lightforce USA d/b/a Nightforce Optics (“Nightforce”), and Sig Sauer all bid the contract. On October 10, 2018, the Agency awarded a contract to Sig Sauer for \$12,077,565 and one to Nightforce for \$21,172,435. LSI’s bid was for [REDACTED].

### C. The Contract Amendment

On July 17, 2019, the Agency published a notice of contract modification in the U.S. Department of Defense Daily Digest. The notice stated:

Sig Sauer Inc., Newington, New Hampshire, is awarded a \$9,338,800 firm-fixed-price modification under previously-awarded contract N00164-18-D-JQ30 for an in-scope change to the internal reticle of the SU-293/PVS Second Focal Plane (SFP) Squad-Variable Powered Scope (S-VPS) to add a glass etched reticle. This modification is to a highly competitive procurement for the SFP S-VPS system. The S-VPSs to be procured are in support of the U.S. Special Operations Command Visual Augmentation Systems Weapons Accessories S-VPS Program. Work will be performed in Newington, New Hampshire, and is expected to be completed by July 2029. No funding will be obligated at time of award. In accordance with 10 U.S. Code 2304(c)(1), this modification was not competitively procured (only one source and no other supplies or services will satisfy agency requirements). The Naval Surface Warfare Center, Crane, Indiana, is the contracting activity.<sup>9</sup>

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<sup>5</sup> Exhibit B at 1 at p. 2.

<sup>6</sup> A reticle is the pattern of lines built into the eyepiece of the scope to assist with targeting.

<sup>7</sup> Exhibit B at 3.17.2 at p. 6.

<sup>8</sup> Exhibit B at 3.17.1 at p. 1.

<sup>9</sup> Exhibit C at p. 3 (emphasis added).



#### IV. GROUNDS FOR PROTEST

##### A. The Agency's Intended Contract Modification Is Arbitrary, Capricious, and in Violation of Law

###### 1. *Legal standards.*

A bedrock principle of procurement law is that agencies must seek full and open competition under the Competition in Contracting Act. See 10 U.S.C. § 2304(a)(1)(A); 41 U.S.C. § 253(a)(1)(A); FAR 6.101(a). In very limited circumstances, however, an agency may invoke an equally limited exception to this rule, but when they do so, GAO will “closely scrutinize” the agency’s proposed sole-source procurement. See *Sperry Marine, Inc.*, B-245654, Jan. 27, 1992, 92-1 CPD ¶ 111 (sustaining protest where agency unreasonable concluded that only one source could meet its needs).

GAO will not consider protests against modifications to contracts unless the contract modification is beyond the scope of the original contract. *Cornishe Aviation and Maintenance, Ltd.*, B-405013.4, Jan. 25, 2013, 2013 CPD ¶ 42 at 3. As GAO has specifically held:

Evidence of a material difference between the modification and the original contract is found by examining changes in the type of work, costs, and performance period between the contract as awarded and as modified. *Overseas Lease Group, Inc.*, B-40211, Jan. 19, 2010, 2010 CPD ¶ 34 at 3. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes found in the modification, and thus whether the modification would have materially changed the field of competition. *Atlantic Coast Contracting, Inc.*, B-288969.2, June 21, 2002, 2002 CPD ¶ 104 at 4.

*Id.* at 4. An agency can issue a sole-source award for an out-of-scope contract modification; however, that modification is still subject to CICA-requirements for awarding sole-source contracts. *Id.* at 3.

###### 2. *The Agency Contract Modification Is Arbitrary and Capricious Because the Scope of Work Is Beyond the Scope of the Original Contract and the Agency Does Not Have a Valid Sole-Source Determination.*

The contract modification should have been separately competed because specialized reticles were not included in the scope of the Contract. The scope of work at issue is the inclusion of a glass-etched reticle in the S-VPS.<sup>10</sup> Reticles are replaceable parts over the life of a rifle scope. The Solicitation specifically required that the S-VPS must be designed so that, when changing the reticle, no other design changes were

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<sup>10</sup> Exhibit A.

necessary to the S-VPS.<sup>11</sup> It also directed bidders that the S-VPS should be designed to accommodate other reticle designs.<sup>12</sup> The scope of work did not identify that the bidders would be asked to create the additional reticle designs. If the Agency did not require the S-VPS manufacturers to allow for alternate reticle designs in the design of the S-VPS, the Agency could have been tied to a single manufacturer for the life-cycle of the S-VPS. These restrictions are calculated to allow the Agency flexibility in the future when it comes to procuring future reticles. Now, when procuring future reticles, the Agency undid the intended flexibility and awarded the reticles on a sole-source basis.

The price of the reticle work also substantiates that the specialized reticle design is beyond the scope of work of the original contract. Sig Sauer's original contract price was \$12,077,565, which included a standard reticle. The modification to provide a specialized reticle was for \$9,338,800 and increased the contract price approximately 77%. Contract modifications are not intended to help the contractor "get well" after an improvident bid. Sig Sauer was significantly lower than either LSI or Nightforce. This contract modification for new work allows Sig Sauer to bring its price in line with its competitors without having to compete for the increased scope. The significant percentage increase in contract price, in addition to the language in the Solicitation, compel a finding that the contract modification is out-of-scope and should have been competed.

As discussed above, the Solicitation did not contemplate the awardee would be automatically awarded further reticle designs. The Agency justified its sole-source to Sig Sauer on the basis that no other manufacturer could provide it with the reticle that it required.<sup>13</sup> Yet, the scope of work stated "[t]he vendor shall allow for future reticle designs and operational needs ..." <sup>14</sup> and "[t]here shall be no changes to the S-VPS Scope design when changing to a new reticle, other than the reticle itself."<sup>15</sup> The scope of work makes clear that the Agency intended Sig Sauer to make its scope available to other manufacturer's reticles because it requires Sig Sauer to allow for future designs (which are not part of the scope of work) and to design the S-VPS so that when the Navy decides to change to a new reticle, the Navy is not required to pay Sig Sauer to redesign the S-VPS. While Sig Sauer is certainly allowed to compete for the reticle procurement, it is not guaranteed that work through a sole-source award.

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<sup>11</sup> Exhibit B at 3.17.2 at p. 6.

<sup>12</sup> *Id.* at p. 1.

<sup>13</sup> Exhibit A.

<sup>14</sup> Exhibit B at 3.17.1 at p. 1.

<sup>15</sup> Exhibit B at 3.17.2 at p. 6.

3. *The Agency's Contract Modification Is Not Procedurally Correct for a Sole-Source Award.*

As GAO held in *Cornsiche*, if the contract modification is not within the scope of the contract, then the modification is subject to CICA's competition requirements. B-405013.4 at 3. 10 U.S.C. § 2304 (a) requires the Department of Defense to "obtain full and open competition" unless an exception exists. 10 U.S.C. § 2304(c) allows the Agency to issue a sole-source award if "the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency." In this case, the Agency has stated that it based its procurement procedure on the grounds that Sig Sauer was the only manufacturer capable of fulfilling the Agency's needs pursuant to 10 U.S.C. § 2304(c).

If the Agency is to use a sole-source award procedure, then it also must follow the procedures in FAR Part 6. FAR 6.303-1(a) requires the Contracting Officer to justify the sole source decision in writing. FAR 6.304 (a)(2) requires that, for contracts above \$700,000 and less than \$13.5 million, the Competition Advocate to approve the Contracting Officer's justification in writing. FAR 6.305 then requires the Agency to make the determination publicly available at FBO.gov. To date, the Agency has not made the determination publicly available on FBO.gov. Therefore, the Agency has failed to comply with the procedural requirements to issue a sole source award to Sig Sauer.

4. *LSI has been prejudiced.*

GAO "will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award." *Halbert Constr. Co., Inc.*, B-413213, Sept. 8, 2016, 2016 CPD ¶ 254 at 17. GAO will "resolve doubts regarding prejudice in favor of [the] protester." *Valor Healthcare, Inc.*, B-412960, B-412960.2, July 15, 2016, 2016 CPD ¶ 206 at 8. As one of the largest manufacturers of riflescopes and reticles and a provider of riflescopes to the Government, in addition to being an actual bidder on the S-VPS procurement, the Agency's actions have prejudiced LSI because LSI would have had a substantial chance at receiving the award for the upgraded reticle.

## V. REQUEST FOR RULING AND RELIEF

In light of the numerous errors in the procurement process discussed above, LSI specifically requests a ruling from the GAO that sustains its protest and grants LSI the following relief:

1. Recommend that the Agency terminate or rescind its intended contract modification under Contract No. N00164-18-D-JQ30;



2. Recommend that the Agency compete the requirement for the reticle; and
3. Grant LSI any other appropriate relief.

#### **VI. SERVICE ON THE AGENCY**

In accordance with 4 C.F.R. § 21.1(e), FAR 33.104(a)(1), and Solicitation § 52.233-2, a copy of this protest is being furnished within one day of the protest being filed to:

Naval Surface Warfare Center Crane Div  
Casey Bault  
Bldg 3373 300 Hwy 361  
Crane, IN 47522-5001  
812-854-2378  
Casey.bault@navy.mil

#### **VII. INDEX OF ATTACHED EXHIBITS**

<b>Exhibit A</b>	Department of Defense Daily Digest for July 17, 2019
<b>Exhibit B</b>	Solicitation No. N00164-18-R-JQ30, Performance Specification
<b>Exhibit C</b>	Solicitation No. N00164-18-R-JQ30

#### **VIII. REQUEST FOR PROTECTIVE ORDER**

This protest contains information that is confidential and proprietary to LSI and/or documents requested in this protest will contain confidential and proprietary information of LSI or agency source selection sensitive information. Pursuant to 4 C.F.R. § 21.4, LSI requests that GAO issue a Protective Order to govern the disclosure and handling of protected information in connection with this protest.

#### **IX. REQUEST FOR DOCUMENTS**

Pursuant to the provisions of 4 C.F.R. § 21.1(d)(2), LSI requests production of the following documents:<sup>16</sup>

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<sup>16</sup> "Document" or "documents" is used in its broadest sense and means and includes all written, printed, recorded or graphic matter, sound reproduction, electronic media or any tangible object from which previously stored information may be retrieved. Without limiting the foregoing, the term "documents" shall include all written communications, correspondence, letters, telegraphs, telexes, e-mail, messages, memoranda, records, reports, books, summaries or other records of public or private talks, or conversations, minutes, or summaries or other records of meetings or conferences, summaries or other records of talk, discussions, or negotiations, diaries, diary entries, calendars, appointment books, instruments, assignments, statistical data or statements, financial statements, worksheets, work papers, drafts, graphs, maps, charts, analytical records, consultants' reports, bulletins, press releases, advertisements, publicity materials, signs, notes, notices, marginal notations, notebooks, telephone bills, bills, statements, records of obligations, and expenditures, invoices, lists, journals, recommendations, files,

1. The modification to Contract No. N00164-18-D-JQ30 to add the glass etched reticle for the internal reticle of the SU-293/PVS Second Focal Plane (SFP) Squad-Variable Powered Scope(S-VPS);
2. All documents reflecting, pertaining to, or considered by the Agency in connection with the modification to Contract No. N00164-18-D-JQ30 to add the glass etched reticle for the internal reticle;
3. All documents reflecting, pertaining to, or considered by the Agency in connection with the Agency's decision that there was only one source and no other supplies or services would satisfy the Agency's requirements for Contract No. N00164-18-D-JQ30's reticle modification; and
4. All other documents relating or pertaining to issues raised in this protest, or to arguments, statements or alleged facts raised in the Agency Report.

#### **X. REQUEST FOR HEARING**

LSI requests a hearing on its allegations in this Protest pursuant to 4 C.F.R. § 21.1(d)(3). LSI respectfully submits that given the issues discussed above, testimony will aid in the resolution of this Protest.

Very truly yours,

OLES MORRISON RINKER & BAKER LLP

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