

**Livermore Lab Green Renewable Energy and Environmental Nexus (GREEN),
Limited Liability Company Protest
of
United States Department of Energy National Nuclear Security Administration
Procurement Action Pursuant to Solicitation No. DE-RP52-06NA27344
for
Management and Operation of Lawrence Livermore National Laboratory**

Filed electronically January 16, 2007

EXECUTIVE SUMMARY:

The Livermore Lab GREEN, LLC files this protest under the provisions of the Federal Acquisition Regulations (FAR) to remedy the U.S. Department of Energy National Nuclear Security Administration's improper and biased handling of the group's proposal to manage Livermore Lab in compliance with U.S. laws and treaty obligations, including the nuclear Non-Proliferation Treaty.

The Livermore Lab GREEN, LLC seeks legal relief in the form of "reinstatement" as an active competitor in the bidding process. The protest also requests a suspension in the NNSA's procurement process until the group is put back on equitable footing with the other bidders.

The protest charges that NNSA acted improperly by rejecting the Livermore Lab GREEN, LLC bid on grounds that were factually incorrect, unsubstantiated, biased and prejudicial, contrary to regulations and/or easily corrected according to the FAR and common business practice.

The protest rests on the basic moral and legal principle of fair competition. The group believes it was unfairly eliminated from the competition fundamentally because NNSA officials involved in the evaluation did not agree with its philosophical and political approach to attracting more civilian science to Livermore Lab and moving the facility away from classified nuclear weapons activities over time.

The protest charges the NNSA:

- **Conducted a legally-deficient process in disallowing the GREEN, LLC bid**, including by canceling the debriefing meeting as team members were calling in, and then refusing to reschedule it. This and other NNSA actions constructively denied the LLC its legally mandated opportunity to "resolve concerns" via "open and frank discussion."
- **Made factually-incorrect assertions in its grounds for rejecting the bid**, including by claiming that information was missing from the bid package when it was there. In another instance, the NNSA asserted that the team's proposed director, Dr. Robert Civiak, had not submitted a signed resume, when in fact NNSA had chosen to delete its last two pages, including the signature page.

• **Made unsubstantiated allegations in its basis for rejecting the bid**, including allegations that the bid would "inhibit NNSA from complying with the law." When the LLC asked NNSA pointed questions about "which laws," the agency refused to respond in a substantive manner. Moreover, the NNSA rejection asserted the bid's "inconsistency" with directives and program plans. Yet, the bid closely aligned with congressional directives to remove weapons-usable plutonium from Livermore Lab before 2014, while the NNSA Solicitation did not.

• **Acted in a biased and prejudicial manner in its rejection of the bid** by treating the Livermore Lab GREEN, LLC and its proposal differently than it treated competitors.

• **Used grounds in rejecting the bid that could easily have been corrected under the provisions of Federal Acquisition Regulations (FAR)**, for example by rejecting the group's proposal because it provided the managing entity's board of directors list but not the lists for other partners.

The group also cited congressional disapproval of the NNSA's Livermore Lab bidding process on similar grounds. The LLC's protest includes Representative David Hobson's letter late last year as Chairman of the House Energy and Water Appropriations Subcommittee. Hobson wrote: "In mandating competition, it was the intent of Congress to attract the widest possible group of interested bidders... The Department of Energy has resisted moving in the direction of fair and open competitive processes. Unfortunately, the Department has... telegraphed to the contractor community that innovative ideas and concepts would not be favorably received."

BODY OF THE PROTEST:

The Livermore Lab GREEN, LLC protest follows the order and requirements established by the Federal Acquisition Regulations (FAR), and incorporates other applicable regulations including those noted herein. We begin with the specific requirements of FAR 33.103 (d)(2).

(i) Name, Address, Fax, Phone:

Livermore Lab Green Renewable Energy and Environmental Nexus (GREEN), LLC, Marylia Kelley, manager. Address: 2582 Old First Street, Livermore, CA 94551. Fax: (925) 443-0177. Phone: (925) 443-7148.

(ii) Solicitation Number:

The Department of Energy National Nuclear Security Administration (NNSA), DE-RP52-06NA27344 for management and operation of the Lawrence Livermore National Laboratory.

(iii) Legal and factual grounds, and resulting prejudice to Livermore Lab GREEN, LLC:

1. The NNSA conducted a legally-deficient process in disallowing the Livermore Lab GREEN, LLC bid:

The Department of Energy National Nuclear Security Administration (NNSA) process did not comply with the law, including the provisions of FAR 33.103 (b) covering debriefing that states:

"all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussion."

The NNSA, in a letter dated December 4, 2006, rejected the Livermore Lab GREEN, LLC proposal for the management and operation contract for the Lawrence Livermore National Laboratory and stated that it would give the bid no further consideration.

That letter contained biased and prejudicial statements about the Livermore Lab GREEN, LLC proposal. The letter was also rife with factual inaccuracies and unsubstantiated assertions about the Livermore Lab GREEN, LLC bid. The NNSA letter cited "information that was missing" (mistakenly, in some cases), but offered no opportunity for the LLC to provide it.

The December 4, 2006 letter did state that if Livermore Lab GREEN, LLC requested a debriefing within 3 days of the receipt of the letter, the Contracting Officer, Daniel Saiz, would "establish a date/time/location for the debriefing."

The members of the Livermore Lab GREEN, LLC understood the debriefing process to be an opportunity to discuss the NNSA rationale for rejecting its bid early in the process and before the oral presentation phase of the competition. We hoped and expected through the debriefing process to be able to ask questions, engage in discussion and provide information to NNSA that could have a bearing on the agency's decision. We sent a timely letter dated December 8, 2006 requesting a debriefing and suggesting that a teleconference would be a "reasonable, cost effective 'location'" for it.

On December 11, 2006, Mr. Saiz sent a letter scheduling a 90-minute debriefing meeting by teleconference on December 20, 2006 at 10 AM Mountain Standard Time. The letter also contained the call-in number for team members of the Livermore Lab GREEN, LLC.

On December 14, 2006, the Livermore Lab GREEN, LLC sent a letter requesting a change in date for the scheduled debriefing meeting. Our letter requested a date change in part to better cooperate with the NNSA request that questions be sent at least one day in advance of the debriefing meeting -- as Livermore Lab GREEN, LLC manager Marylia Kelley was on business travel until December 20 (a fact that was known to the Contracting Officer). It is important to note that the Livermore Lab GREEN, LLC letter in no way canceled the scheduled meeting.

NNSA did not respond to the Livermore Lab GREEN, LLC's December 14, 2006 letter. So, members of the Livermore Lab GREEN, LLC prepared to participate in the meeting at its original date and time. About 15 minutes before the scheduled meeting on December 20, Daniel Saiz called Marylia Kelley and abruptly and unilaterally canceled the meeting. Mr. Saiz mentioned the December 14 letter requesting a date change for the debriefing. Ms. Kelley pointed out that the group's letter did not cancel the debriefing and that she and other Livermore Lab GREEN, LLC members had juggled travel, familial holiday obligations and other scheduling difficulties in order to participate in the meeting at the date and time scheduled by NNSA.

Mr. Saiz responded by reiterating his absolute refusal to hold the debriefing meeting at the time, date and location that he himself had scheduled. It was canceled, he said. Moreover, Mr. Saiz refused to reschedule the meeting, though Ms. Kelley requested that he do so. Mr. Saiz told Ms.

Kelley that he had already prepared a written debriefing memorandum and that it was on his computer ready to send. It was all that the Livermore Lab GREEN, LLC was entitled to, according to Mr. Saiz. It was a short and abrupt phone call.

Other members of the Livermore Lab GREEN, LLC attempted in a timely manner to call-in from their locations to participate in the scheduled debriefing meeting. They, too, were told by Mr. Saiz that he was canceling the meeting and that he would not reschedule. Later that day, Marylia Kelley sent Daniel Saiz (by email and fax) nineteen detailed questions and an addendum again requesting a debriefing meeting.

Mr. Saiz sent a cover letter dated December 26, 2006 with an undated document titled "Preaward Debriefing" to Marylia Kelley. Ms. Kelley understood this "Preaward Debriefing" to be the document referred to as having been already prepared by Daniel Saiz in his phone call the morning of December 20, 2006. The document was not responsive to the group's 19 questions.

On January 3, 2007, Marylia Kelley re-faxed Mr. Saiz the 19 questions that had been sent on December 20, 2006 along with an additional letter and questions. Mr. Saiz sent a letter dated January 4, 2007 that (1) refused to respond to the fax of January 3rd as that fax had been received by NNSA at 5:38 MST, after the close of business, and (2) repeatedly referred to the "Preaward Debriefing" memo as answers to the 19 questions that had been sent on December 20, 2006.

As mentioned above, that memo was substantially or wholly written before the Livermore Lab GREEN, LLC's 19 questions were transmitted to NNSA on December 20, and was not responsive to them. Moreover, the "Preaward Debriefing" memo, like the rejection letter before it, contained agency bias, assertions and factual errors.

We believe that the NNSA Contracting Officer conducted a deficient debriefing process that failed to respond to our questions, did not allow us an opportunity to dialogue with NNSA or to set the record straight in instances where NNSA made factual errors in its basis for rejecting the bid. The NNSA process, we believe, did not rise to the standard of "open and frank discussion" by "all parties" as set forth by FAR 33.103(b). The Livermore Lab GREEN, LLC contends that its right to a compliant debriefing and "open and frank discussion" has been constructively denied by NNSA.

2. The NNSA made factually-incorrect assertions in its grounds for rejecting our bid.

Below are four of the areas where the NNSA's stated basis for disallowing the Livermore Lab GREEN, LLC's management proposal contains factual errors.

- A. The NNSA basis for rejection asserts that the Livermore Lab GREEN, LLC failed to include four specific amendments in its management bid. The "Preaward Debriefing" memo, for example, spends several pages (pp. 2-5) on the bid's failure to acknowledge the amendments to the Solicitation and on the importance of that failure in the NNSA decision to reject our bid. The "missing" amendments are 001, 002, 003 and 004. However, these "missing" amendments were properly submitted. If necessary, I (Marylia Kelley) am willing to sign an affidavit swearing that I provided timely and proper submittal of the amendments in the original bid package as outlined in the Solicitation and as shown in our exhibits to this

protest.

- B. The NNSA basis for rejection asserts that the Livermore Lab GREEN, LLC failed to include the signature of its proposed Livermore Lab director in its bid. This is given in reason #4 for rejecting our bid by NNSA in its December 26 letter. The “missing” signature of proposed Livermore Lab director Dr. Robert Civiak was in the bid package but was disregarded by NNSA because the agency chose to chop off the last two pages of Dr. Civiak's resume and the last page was the signature page. (Note that Dr. Civiak used the form NNSA provided in the Solicitation for resumes.)
- C. The NNSA also said in its reason #4 of December 26 that our bid was deficient because it did not include full resumes for all of the management personnel listed in our Livermore Lab organizational chart. Note that the Solicitation itself stated that the proposed director's resume was mandatory -- all others were not. Therefore, the additional resumes were not "missing". The Livermore Lab GREEN, LLC submitted a bid in compliance with the Solicitation. Further note that even if NNSA wanted to impose a different standard than was printed in the Solicitation, this matter could have been resolved either as an allowed "minor informality" or during the oral presentation that was denied us due to the NNSA rejection of our bid in advance of the oral presentation. (We stated to NNSA during the debriefing process that we would be willing and able to provide additional information as permitted by the FAR; however NNSA was not receptive.)
- D. The NNSA basis for disallowing the Livermore Lab GREEN, LLC management bid contained other factual errors as well. For example, the NNSA's December 26 letter states that our proposal "fails to provide past performance information" for members of the LLC. First, this would not be an adequate legal basis for early rejection even if true. Second, it is neither true nor correct. The bid package submitted to NNSA included past performance information for Livermore Lab GREEN, LLC member Tri-Valley CAREs in managing federal contracts. In 1989, Tri-Valley CAREs was the first organization in the western United States (i.e., EPA Region IX) to receive a federal EPA Technical Assistance Grant. That contract was for work related to the Lawrence Livermore National Laboratory main site Superfund cleanup. Due to exemplary performance in managing that EPA grant, Tri-Valley CAREs was awarded a second EPA contract for work related to the Livermore Lab Site 300 Superfund cleanup. Both of those EPA contracts have been renewed periodically based on excellent performance. The most recent renewal for the EPA Site 300 contract was in 2004. The most recent renewal for the main site contract was in 2006. In April 2000, the EPA Region IX presented Tri-Valley CAREs with an "Outstanding Achievement" award. This was followed by a national EPA award in August 2000. Both award certificates, along with supporting information and EPA contact numbers, were submitted with the bid. In the "Preaward Debriefing," the NNSA language changes and it does acknowledge the fact that past performance information was submitted for Tri-Valley CAREs, but then it incorrectly asserts that the past performance is less than 3 years old and therefore unacceptable for NNSA to evaluate.

3. The NNSA made unsubstantiated allegations in its basis for rejecting our bid.

Below are key assertions that NNSA made in rejecting our bid that NNSA did not substantiate,

including in circumstances where the Livermore Lab GREEN, LLC specifically requested additional information from NNSA.

- A. In rejecting our bid, NNSA alleged that our proposal would inhibit the agency from complying with the law. Specifically, the NNSA stated in its December 4, 2006 letter that the Livermore Lab GREEN, LLC management bid "did not demonstrate an understanding of the solicitation where it proposed [a] change in the overall direction of future missions at the Lawrence Livermore National Laboratory... We [Livermore Lab GREEN, LLC] propose to phase out the Lab's nuclear weapons programs over time." This, NNSA alleged, "would seriously undermine DOE/NNSA's ability to comply with federal law." We were particularly taken aback by this allegation as the Livermore Lab GREEN, LLC proposal contains measures to bring Livermore Lab into better compliance with U.S. law and treaty obligations, including the nuclear Non-Proliferation Treaty. Therefore, in our 19 questions submitted to NNSA, we asked directly "which federal law(s)" would be violated in the quote above. NNSA did not respond substantively to our question.

- B. In rejecting our bid, NNSA also alleged that our proposal was "inconsistent" with "strategic" and "program plans for LLNL." This was stated in the context of the above-mentioned quote re: "[a] change in the overall direction of future missions at LLNL." NNSA's allegation fails to take into account that our proposal is in line with present and emerging congressional directives to remove weapons-usable quantities of plutonium and highly enriched uranium from Livermore Lab before 2014, the date specified in the NNSA Solicitation. Indeed, our bid outlines a plan to remove the weapons-usable quantities of plutonium and highly enriched uranium before 2014 consistent with congressional intent. The NNSA Solicitation is behind the curve in this important area. In our 19 questions, we asked NNSA whether it considered congressional directives leading to the more swift removal of plutonium from Livermore Lab "a change in the overall direction of future missions at Lawrence Livermore National Laboratory" as we proposed in our bid. In its "Preaward Debriefing," NNSA let stand the unsupported allegation that our bid was inconsistent with program plans. Moreover, NNSA did not acknowledge congressional directives to remove nuclear materials from Livermore Lab. Nor did the agency answer our specific questions on this topic in any substantive way. (This is another instance where NNSA failed to answer our specific questions during the debriefing process.)

- C. In addition to emphasizing Livermore Lab compliance with U.S. laws and treaty obligations and a more rapid removal of special nuclear material, our bid laid out a plan to, over time, make Livermore Lab a World-Class Center for Civilian Science. In rejecting our proposal, NNSA repeatedly alleged that bringing more unclassified science to Livermore Lab was "inconsistent with the Solicitation's SOW [statement of work]." To offer one example, NNSA alleged our proposal "to transform LLNL into a world-class center for civilian science as a means for increasing opportunities for scientists and engineers to publish their research in an unclassified environment is... inconsistent with the Solicitation's SOW and contract requirements." In addition to being an unsupported allegation, this is argumentative and incorrect. The Solicitation did not preclude a bidder from proposing more civilian science. Nor did it preclude fostering an environment wherein more scientists and engineers could publish more often in their field. This would increase employee satisfaction and morale. We would hope NNSA would see this as a positive outcome and not as a basis to reject a bidder.

- D. NNSA rejected our bid because our proposal "to transition LLNL to an unclassified environment" included as a positive feature increasing employee morale and community acceptance. In an unclassified environment, we said, Livermore Lab employees would be able to speak freely about their work to family members and friends. We noted too that our Lab management would seek input from Lab employees and surrounding communities on a variety of topics. In the "Preaward Debriefing," NNSA alleged that this would violate numerous laws regarding the handling of classified matter and special nuclear material. This is a mystifying allegation. First, the context for the discussion, as NNSA duly notes in its written excerpts from our bid, involves unclassified science at Livermore Lab. Thus, the handling of classified matter is by definition not relevant here. Additionally, NNSA is required by law (see CERCLA, for example) to "seek input... on a variety of topics" even with present day classified information and large, weapons-usable quantities of special nuclear material on site (which, as noted earlier, will be removed due to congressional directives). To repeat, the context of this discussion of employee and community input in the bid solely involved unclassified research at Livermore Lab. However, even in the present environment, to "seek input" on a "variety of topics" does not necessitate violating any law(s). We believe NNSA is being unreasonable in its allegations, and has not supported them in its basis for rejecting our bid.
- E. Similarly, Mr. Saiz writes on the same page (p. 15) that our bid is rejected because, "LL GREEN proposes to enhance workplace happiness through the completion and operation of NIF [National Ignition Facility] as an unclassified facility for civilian science users..." NNSA vaguely cites unnamed SOW [statement of work] and contract requirements and does not support its allegations with any specifics in this instance either.

In summary, the NNSA rejection in general and the "Preaward Debriefing" in particular contain numerous unsupported allegations. We believe these defects, in conjunction with factual errors, bias, an inadequate debriefing process, refusals to permit "minor informality" clarifications and the other deficiencies listed below, constitute an improper rejection of our bid at this stage in the competition.

4. The NNSA acted in a biased and prejudicial manner in its rejection of our bid:

- A. We believe that the Livermore Lab GREEN, LLC and its bid were treated differently than other offerors. In this context, we note, for example, that a NNSA contracting officer told Marylia Kelley in October 2006 that the solicitation deadline was extended from October 12, 2006 to October 27, 2006 at the request of a prospective corporate offeror. Yet NNSA refused to negotiate or even allow the Livermore Lab GREEN, LLC to appropriately discuss its proposal in a teleconference or other meaningful process during "debriefing."
- B. We note as well that clarifying discussions not permitted to the Livermore Lab GREEN, LLC are likely to have taken place between NNSA and the other bidders. The solicitation is long and complex and the period allotted to offerors for bid preparation was short. And, we know that according to the NNSA's schedule it has offered other bidders an opportunity not afforded the Livermore Lab GREEN, LLC through its all-day, in-person oral presentation/defense process.

- C. The NNSA's fundamental reason for disallowing the Livermore Lab GREEN, LLC to compete further is its unwillingness to consider making Livermore Lab a World-Class Center for Civilian Science. This is a philosophical and political stance that was never substantiated by fact or law and does not constitute a reasonable basis for early rejection of a bid under the FAR.
- D. Portions of NNSA's alleged basis for rejecting our bid and our participation in the oral presentation/defense could have been easily resolved via the Section L "proposal revision" process. Section L, page 357 states: ""Proposal revision" is a change to a proposal made after the solicitation closing date at the request of or as allowed by a Contracting Officer as the result of negotiations." In this regard we note that the NNSA's initial rejection letter of December 4, 2006 stated unequivocally that "No revision to your proposal shall be accepted or considered by the government." Given that this letter was NNSA's first communication with the Livermore Lab GREEN, LLC about the agency's rejection of the bid, this refusal was not "the result of negotiations." Moreover, there was no opening to discuss "proposal revision" options at all with NNSA though the Livermore Lab GREEN, LLC did request it during the debriefing process. We believe NNSA's adamant refusal to discuss this and any other process that would offer NNSA appropriate information (even in instances the agency alleged it needed it to further evaluate the proposal) is due to an underlying bias against the LLC and its bid.
- E. Moreover, portions of NNSA's alleged basis for rejecting our proposal could and can be easily resolved using the provisions in the FAR 14.405 covering "minor informalities." The Livermore Lab GREEN, LLC highlighted this in its 19 questions, but NNSA was unresponsive. See below for details.

5. NNSA used grounds in rejecting the bid that could have been corrected under the legal definition of a minor informality according to FAR 14.405 and/or under Section L:

The NNSA rejection states that the agency needed information that Tri-Valley CAREs provided for itself as the LLC manager for the other three partner groups as well. For example, NNSA said that boards of directors lists and organizational federal form 990s (available to the public at large) that were included in the bid package for Tri-Valley CAREs should have been included for the other members in the LLC. We stated our willingness to provide this information.

This situation fits even a narrow reading of "minor informality" that could have been (and can be) corrected without prejudicing the other bidders' chances. According to the FAR, a "minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either SHALL [emphasis added] give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government. Examples of minor informalities or irregularities include failure of a bidder to—

- (a) Return the number of copies of signed bids required by the invitation;
- (b) Furnish required information concerning the number of its employees..."

- A. If NNSA really wanted additional information on the boards of directors and other similar documentation for other member groups of the Livermore Lab GREEN, LLC (beyond the ones already provided in paper form with the bid for Tri-Valley CAREs and notwithstanding that our bid directed NNSA specifically to web sites where much of the additional information could have been obtained) then we could and would have provided paper copies to NNSA as a "minor informality." We offered to do so in our debriefing correspondence. NNSA did not respond.
- B. In many instances what the NNSA "Preaward Debriefing" called a "failure" to provide information in the bid was not a failure to comply with the solicitation's requirements. Rather the agency either (1) didn't like the information that was provided, or, (2) opined that the Livermore Lab GREEN, LLC should have provided more of it. (We note again the Livermore Lab GREEN, LLC is willing to provide clarification and additional information as appropriate under the "minor informality" provision and/or Section L of the FAR, and that NNSA could have also obtained clarification and additional information during the oral presentation/defense element of the competition if NNSA had not disallowed our bid in advance of it.)

6. Description of the resulting prejudice to the Livermore Lab GREEN, LLC and its bid:

The prejudice and harm to LL GREEN, LLC are rather straightforward. The management contract for Livermore Lab is a negotiated contract being competitively bid by NNSA. Points are awarded as part of the competition for performance during the oral presentation segment. We are denied an opportunity to participate and therefore to compete fairly. To be clear, we are not saying in this protest that NNSA ought to choose us if another bidder fairly "wins" more points overall. However, we do believe that the FAR and the Department of Energy's own implementing regulations require NNSA to provide a level playing field. Moreover, NNSA's contention that our bid is "unacceptable for further evaluation" was improperly ascertained (i.e., the basis for determination was deficient) as well as incorrect. The NNSA rejection was based in large part on the items we list above -- including instances where NNSA statements were factually wrong.

Regarding the prejudice involved, please note again that we are not arguing that we should be the "chosen" bidder -- that selection has yet to be made by NNSA. Our protest is based on the legal and moral principle of fair competition. We were unfairly eliminated fundamentally because NNSA does not like our philosophical and political approach to attracting more civilian science to Livermore Lab and moving it away from nuclear weapons research and development over time and in keeping with congressional bills and other future laws. Our requested relief is in line with this (i.e., we are asking for reinstatement into the competition, not any special treatment or special guarantee of ultimate victory in being awarded the contract. This is an issue of basic fairness). That basic fairness was denied to us has resulted in the prejudicial rejection of our bid, the refusal of a full and sufficient debriefing process subsequent to the initial rejection letter, and the further harm of not being permitted to complete the remainder of the bidding process.

(iv) Copies of relevant documents: Transmitted in PDF at the date and time as the protest, and

incorporated as part of the protest, are --

1. Signed cover page of Volume 1 (b) The Offeror shall submit a fully completed and executed Standard Form (SF) 33. That form incorporates and "accepts" amendments 001, 002, 003 and 004, and they are listed (and therefore were not "missing"). We are sending the true and correct original cover page with the four amendments that was signed by me (Marylia Kelley) and mailed as part of the bid package.
2. Amendment 004, additional submittal of this amendment was signed by me and mailed (multiple copies) with the bid package. The copy we are transmitting with the protest is a true and correct copy of Amendment 004 originally submitted with the bid package.
3. U.S. Representative David Hobson's letter of September 21, 2006 quoted in the protest.
4. Dr Robert Civiak's resume with his signature, which was not "missing." We are sending the true and correct original document submitted as part of the bid package.
5. The NNSA and Livermore Lab GREEN, LLC correspondence that occurred pursuant to the debriefing process.
6. *Additional documents are available on request.*

(v) Request for a ruling by the agency:

The Livermore Lab GREEN, LLC requests a ruling by DOE/NNSA. We note, however, that FAR 33.103 (b) provides: Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and other agency's personnel are acceptable protest resolution methods. Nothing in this request for a ruling by the agency precludes these options. Indeed, we believe these methods are particularly appropriate in this instance as the actions of the Contracting Officer, Daniel Saiz, are at issue in the protest.

For example, Mr. Saiz curtailed the debriefing process by canceling the scheduled debriefing teleconference as members of Livermore Lab GREEN were in the process of calling in. This action, coupled with Mr. Saiz' total refusal to reschedule the teleconference, at a minimum, violates the stipulation in FAR 33.103 (b) that all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussion. We read "all parties" to include NNSA.

Moreover, that Mr. Saiz utilized a prewritten letter (by his own admission) as his "response" to our 19 specific questions is additional evidence of Mr. Saiz' inability or unwillingness to resolve, including through open and frank discussion, legitimate concerns about the basis for rejection raised by the Livermore Lab GREEN, LLC.

Further, nothing in our request for an agency ruling precludes our right to be granted to the full extent accorded by DOE procedures an independent review above the level of the contracting officer, as provided for in FAR 33.103 (4).

(vi) Statement as to the form of relief requested:

The Livermore Lab GREEN, LLC believes that the Contracting Officer, Daniel Saiz, acted improperly by rejecting the LLC's bid on grounds that were factually incorrect, unsubstantiated, biased and prejudicial, contrary to regulations and/or easily corrected under the legal definition of a minor informality according to FAR 14.405. We note, too, that although Mr. Saiz did not afford the Livermore Lab GREEN, LLC an opportunity to provide additional information or to in any way modify our bid, additional "modifications" by a bidder to a proposal are permitted according to Section L of the Solicitation. The Solicitation is under the FAR Part 15, Contracting by Negotiation, and its Section L states, for example: ""Proposal revision" is a change to a proposal made after the solicitation closing date at the request of or as allowed by a Contracting Officer as the result of negotiations."

The Livermore Lab GREEN, LLC requests relief in the form of reinstatement as an active bidder in the competitive bidding process.

We note that the NNSA rejection of the Livermore Lab GREEN, LLC bid in advance of the oral defense deprived us of our ability to not only address questions from NNSA but also to garner points in the second largest point category (275 points out of 1,000). The oral presentation would have been the next step in the process, and, so, we are willing to participate in it shortly after reinstatement. To the best of our knowledge and belief, the other two bidding teams recently completed the oral presentation phase (which offered them an unfair competitive advantage over the Livermore Lab GREEN, LLC team as we were not permitted to compete). We ask that we be given an opportunity to present and defend our proposal in the oral presentation element of the selection process.

As part of the relief sought, we also request a suspension in the procurement process until we are reinstated and can compete in the oral presentation part of the process. This suspension could be limited to the time it takes to conduct the oral presentation to put the Livermore Lab GREEN, LLC back on equitable footing with the other two competitors. If the NNSA chooses to act expeditiously in this regard, the suspension could be a short one that has little or no discernable impact on the final schedule.

In addition, we note that NNSA offered a debriefing process that did not meet the full requirements of the law. Relief in the form of a return to the debriefing process to remedy its defects is a legal possibility, and we do not foreclose it. However, relief that returns NNSA to the debriefing process may impact the contract award process more substantially than the awarding of the relief specified in the paragraphs above (i.e., reinstatement), given, for example, the potential for a full and fair debriefing to result in reinstatement and the conduct of an oral presentation at a later date (following debriefing).

(vii) Establishing that protester is an interested party for the purpose of filing a protest:

On October 27, 2006, the Livermore Lab GREEN, LLC filed a timely and substantively complete proposal responsive to Solicitation DE-RP52-06NA27344 for management and operation of the Lawrence Livermore National Laboratory. The Livermore Lab GREEN, LLC proposal was summarily rejected by NNSA in a letter dated November 4, 2006. The Livermore Lab GREEN,

LLC sought a debriefing process wherein it could obtain answers to its appropriate questions, resolve concerns that NNSA may have had with the bid, resolve minor informalities with appropriate additional information for NNSA, and provide appropriate additional information as well in areas where Livermore Lab GREEN, LLC believed that NNSA erred with regard to the facts of the GREEN, LLC bid. The debriefing process with members of the Livermore Lab GREEN, LLC was first curtailed (by canceling the meeting, for example) and then terminated (via letter) by the NNSA Contracting Officer. The Livermore Lab GREEN, LLC, therefore, is the interested party bringing this protest.

(viii) Establishing the timeliness of the protest:

On January 5, 2007, Marylia Kelley, manager of the Livermore Lab GREEN, LLC received a letter dated January 4, 2007 and signed by Daniel Saiz, NNSA Contracting Officer. It stated: "[T]his letter now concludes your debriefing. A copy of this letter will be sent to you via Federal Express. Any questions you have pertaining to filing a protest may be answered in Section L of the Solicitation."

The Livermore Lab GREEN, LLC understood that this letter cut off all consideration, communication and recourse through the NNSA debriefing process for the LLC's bid. To preserve our rights, a protest became necessary at that point.

We note that FAR 33.103 (4)(c) states in part: ... Protests shall be filed no later than 10 days after the basis of the protest is known or should have been known. Section 33.101 Definitions, further states that the day of the act or event is not included in the ten days [i.e., the day the letter to Livermore Lab GREEN, LLC from NNSA was received via Federal Express, which was January 5, 2007]. According to Section 33.101, the last day of the ten days is included unless it includes a Saturday, Sunday or Federal holiday. As the birthday of Dr. Martin Luther King, Jr. is a Federal holiday, the 10th day is Tuesday, January 16, 2007. The protest is being filed as outlined in the NNSA Solicitation Section L before COB on January 16, 2007.

Additional facts for consideration in the protest related to dispute resolution and third party neutrals:

The Livermore Lab GREEN, LLC requests, at no cost to the protesting party, alternative dispute resolution and encourages NNSA to consider as provided for by FAR the use of third party neutrals.

Additional facts for consideration in the protest related to FAR 33.103 (3):

As listed in the Solicitation, the protest is directed to: Daniel J. Saiz, Contracting Officer, U.S. Department of Energy, National Nuclear Security Administration, M & O Contract Support Division, NNSA Service Center, PO Box 5400, Albuquerque, New Mexico 87185-5400. By prior written agreement, and at his request, this protest is being electronically filed with Mr. Saiz to <dsaiz@doeal.gov>.

Additional facts for consideration in the protest related to FAR 33.103 (4) and other applicable regulations:

In accordance with agency procedures, including the DOE Acquisition Regulation 933.103, and to the full extent thereby permitted, the Livermore Lab GREEN, LLC requests an independent review of our protest at a level above the contracting officer.

Additional relevant facts:

In addition to the legal requirement for NNSA to produce and execute a fair competition under the FAR and other applicable regulations, U.S. congressional representatives have weighed in and expressed their disappointment with NNSA's resistance to running a fair and open competition in the Livermore contract bidding process. On September 21, 2006, Representative David Hobson (R-OH), in his role as Chairman of the House Energy and Water Development Appropriations Subcommittee, wrote: "In mandating competition, it was the intent of Congress to attract the widest possible group of interested bidders... The Department of Energy has resisted moving in the direction of fair and open competitive processes. Unfortunately, the Department has... telegraphed to the contractor community that innovative ideas and concepts would not be favorably received." Since Representative Hobson wrote that letter last Fall, the NNSA has summarily rejected the Livermore Lab GREEN, LLC bid and prevented us from competing in the oral presentation component of the bidding process. This NNSA action reduced an already too-narrow field by one-third.

THE PRIMARY LAW CITED IN THE PROTEST:

Under the Federal Acquisition Regulations (FAR) at 33.103:

- (a) Reference. Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests.
- (b) Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussion.
- (c) The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.
- (d) The following procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:
 - (1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section may be grounds for dismissal of a protest.
 - (2) Protests shall include the following information:
 - (i) Name, address, and fax and telephone numbers of the protester.
 - (ii) Solicitation or contract number.

- (iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.
- (iv) Copies of relevant documents.
- (v) Request for a ruling by the agency.
- (vi) Statement as to the form of relief requested.
- (vii) All information establishing that the protester is an interested party for the purpose of filing a protest.
- (viii) All information establishing the timeliness of the protest.

(3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(4) In accordance with the agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest.

This protest was prepared by Marylia Kelley, manager for the Livermore Lab GREEN, LLC. Questions and follow up correspondence should be sent to Marylia Kelley at the coordinates listed above or via email to: marylia@earthlink.net.

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