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"Revolving Door" Protests

Recent bid protest decisions highlight why it is important for contractors to proceed with caution when hiring former government employees.

BY STEPHEN L. BACON

Former government employees must comply with various post-employment restrictions intended to prevent unethical behavior and actual or perceived conflicts of interest.[1] Upon leaving federal service, former government employees receive an ethics advisory opinion letter that describes the restrictions applicable to their new position. Former government employees have a personal responsibility for complying with these so-called "revolving door" laws and regulations.

But contractors that hire former government employees also must understand that this may create an actual or apparent conflict of interest. Such conflicts can have significant ramifications for contractors and may even result in their disqualification from a procurement. Thus, if a contractor intends to hire a former government employee, the contractor must plan ahead and take active steps to avoid negative consequences for their business.

Government contractors run in small circles and, especially now with the proliferation of social media, it is quite common for contractors to learn that one of their competitors has hired a former government employee. When that occurs, a protest may be filed to allege that the competitor has

a disqualifying conflict of interest that was not properly considered by the contracting officer.

Although the circumstances of every case are unique, there are certain general principles that can be gleaned from the bid protest decisions of the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC) that address conflicts of interest arising from the hiring of former government employees. These decisions provide guidance to contractors that are hiring a former government employee or considering filing a protest against a competitor that hired one.

Legal Framework

Under Federal Acquisition Regulation (FAR) subpart 9.5, contracting officers must identify, evaluate, and seek to avoid, neutralize or mitigate organizational conflicts of interest (OCIs). FAR subpart 9.5 OCIs commonly arise in situations involving (1) unequal access to information, (2) impaired objectivity, or (3) biased ground rules.[2]

An unequal access to information OCI under FAR subpart 9.5 occurs where a firm has access to nonpublic information as part of its performance of another government contract.[3] This type of OCI is similar to, but distinct from, a situation where a firm obtains access to non-public information as a result of hiring, or forming a subcontracting or consulting relationship with, a former government employee.

GAO has ruled that "challenges based on an offeror's hiring or association with former government employees who have access to non-public, competitively useful information are more accurately categorized as unfair competitive advantages under FAR subpart 3.1 rather than OCIs under FAR subpart 9.5."[4]

However, the applicable standard for determining whether a firm has an unfair competitive advantage under FAR subpart 3.1 is "virtually indistinguishable from the standard" applied under FAR subpart 9.5.

GAO will "typically consider all relevant information, including whether the former government employee had access to competitively useful information, as well as whether the former government employee's activities with the firm were likely to have resulted in disclosure of such information."[5]

A firm may be disqualified "based on the *appearance* of impropriety which is created by this situation, that is, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts and not mere innuendo and suspicion."[6]

The protester has an obligation to allege "hard facts" that the former government employee had access to non-public information that could provide the contractor with an unfair competitive advantage. The contracting officer is responsible for determining whether the circumstances warrant disqualification and that decision will not be disturbed by GAO or the COFC unless it is deemed unreasonable.

Contracting officers have specific regulatory authority to waive OCIs under FAR subpart 9.5.[7] GAO has ruled, however, that this authority cannot be invoked to waive the existence of an unfair competitive advantage under FAR subpart 3.1 arising from the hiring of a former government employee.[8]

This means that agencies cannot use the waiver authority under FAR subpart 9.5 to defeat a protest alleging the existence of a FAR subpart 3.1 unfair competitive advantage.

Access and Involvement of Former Government Employees

A key consideration is whether the former government employee's role in the government gave them the opportunity to access non-public, competitively useful information of another contractor. This involves an examination of the positions held by the employee during their time in government service and the types of information they would have been privy to in those roles.

In the protest of *Serco, Inc.*, the protester alleged that Booz Allen Hamilton, Inc. (BAH) and its teaming partners had an unfair competitive advantage as a result of hiring two recently retired Navy captains.[9] The captains were previously program managers for two of the program offices that would be supported by the task order at issue in the protest.

As program managers, the captains had access to monthly reports submitted by the protester under the incumbent contract and the Contractor Performance Assessment Reports (CPARS) for that contract.[10]

In sustaining the protest, GAO noted that the captains, "as program managers, had virtually unlimited access to Serco's detailed information regarding prior costs (including burdened and unburdened labor rates), staffing, technical approach, and past performance."[11] According to GAO, the program managers' access to this information provided an unfair competitive advantage to BAH in connection with the follow-on procurement.

An unfair competitive advantage is less likely to be found where the former government employee was not in a position to acquire another competitor's information. In *Perspecta Enterprise Solutions, LLC*, for example, the protest was denied where the former government employee's role did not give him access to procurement-sensitive information or performance data related to the predecessor contract to implement the Navy's enterprise-wide information technology network for the Naval Information Warfare Systems Command (NAVWAR).[12]

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The awardee's proposed program manager for the Next Generation Enterprise Network Re-Compete (NGEN-R) contract previously served as the executive assistant to the commander of NAVWAR, which allegedly gave him access to information about the NGEN-R procurement and the protester's performance of the incumbent contract known as NGEN.

But GAO found that the contracting officer's investigation reasonably concluded "that neither the former official nor the NAVWAR commander had been sent acquisition planning or strategy documents, had access to restricted share drives containing NGEN-R planning documents, or had access to contracting databases containing [the protester's] NGEN contract performance data."[13]

Importantly, the former official's prior role existed within the NAVWAR systems command office instead of the program executive office, which was responsible for program planning and execution for NGEN and NGEN-R. The former official was therefore not in a role where he was likely to obtain potentially useful information.

Information is Non-Public and Competitively Useful

To create an unfair advantage, the information accessed by the former government employee must be non-public and competitively useful. The usefulness of the information in question depends on a variety of factors including the age and accuracy of the information, whether it could be used to improve an offeror's proposal, and the relationship between the information and the solicitation's requirements and evaluation criteria.

In *Trace Systems Inc. v. United States*, the COFC upheld the Air Force's decision to cancel the Communications Technical Support Services (CTSS) IV contract awarded to the protester in part due to the appearance of impropriety arising from its hiring of the former chief of plans and requirements for the U.S. Air Force Central Command.[14] This

former official worked on preliminary CTSS IV procurement planning, had access to the CTSS III contractor's cost estimates for projects, and was involved in staffing and labor rate discussions related to the incumbent contractor prior to his departure.[15] The Court thus concluded that the contracting officer reasonably determined that the appearance of a conflict existed.[16]

In certain situations, the information at issue does not give rise to an unfair competitive advantage because it is outdated or because it has been publicly released and equally available to all other offerors.

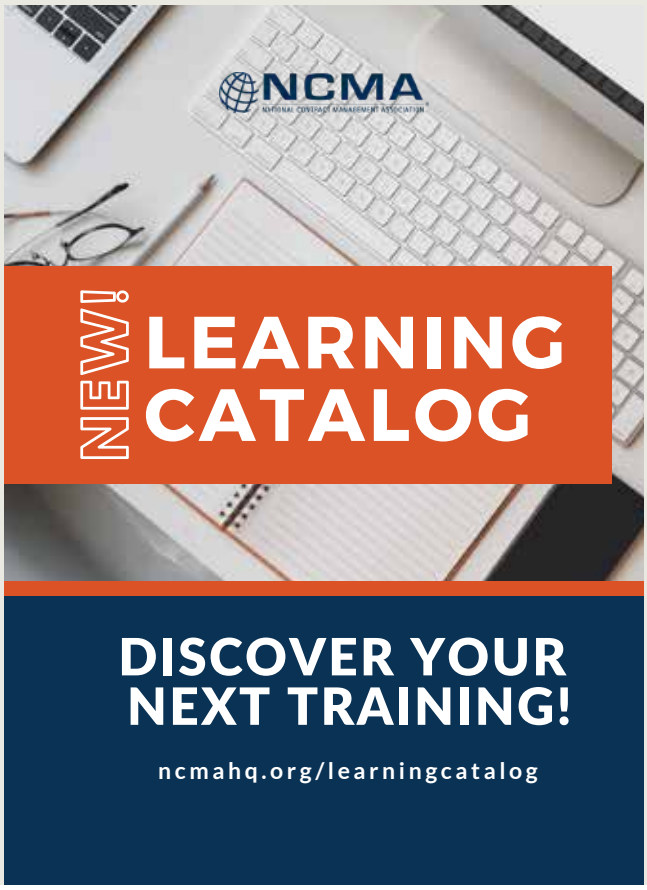
For example, in the protest of *Skyward IT Solutions, LLC*, the former government employee in question had "access to nonpublic pre-solicitation information," but the contracting officer determined that "this information was not competitively useful because" it "had been made public when the [solicitation] was issued or was outdated because the solicitation documents were changed after [the former official] left the agency."[17]

Participation in Proposal Efforts by Former Government Employees

The former government employee's participation in the offeror's proposal development efforts is also a key factor in determining whether an unfair competitive advantage exists.

This was dipositive of the unfair competitive advantage alleged in a protest of Sigmatech, Inc. in connection with the Army's award of a task order to DigiFlight, Inc. for the Security Assistance Management Directorate (SAMD).[18]

Sigmatech alleged that DigiFlight had an unfair competitive advantage because one of its subcontractors hired a former government employee who happened to be the former deputy director at SAMD. Despite this relationship, GAO determined that the contracting officer reasonably concluded that DigiFlight did not obtain an unfair competitive advantage. The evidence showed that the former government employee



was not consulted to assist with the proposal and, in fact, he was hired by the subcontractor *after* DigiFlight's initial quotation was submitted.

A competitive advantage is much more likely to be found where the former government employee is hired by an offeror prior to or during the proposal development stage when they have the opportunity to work on the proposal or influence the offeror's strategy.

That is what happened in the protest of *Raytheon Intelligence & Space*, a case in which the GAO upheld the Navy's decision to exclude Raytheon from competing under a solicitation for the engineering, manufacturing, and development (EMD) phase of the Navy's dual band decoy (DBD) program.[19]

In that case, Raytheon hired a former government employee who supported the DBD program and made recommendations regarding documents used during the previous demonstration of existing technologies (DET) phase of the program. In that role, the former government employee had access to files related to the DET phase performance of Raytheon's competitor, BAE Systems.

He later contributed to Raytheon's response to the Navy's Request for Information (RFI) for the EMD phase and attended the Navy's pre-solicitation conference on behalf of Raytheon. Although the former government employee retired from Raytheon before the final EMD phase solicitation was released, the contracting officer concluded that his involvement with Raytheon's efforts in the EMD phase prior to his retirement was substantial enough to warrant disqualification from the competition.

In upholding the contracting officer's determination, GAO noted that there was "no evidence of formal firewalling procedures or other contemporaneous documented actions that Raytheon took to limit the scope of [the former government employee's] input to Raytheon's proposal in any manner."[20] The contracting officer's decision to disqualify Raytheon based on an appearance of impropriety was similarly upheld by the Court of Federal Claims in a separate protest.[21]

Conclusion

GAO and COFC decisions underscore why contractors must be aware of any actual or potential unfair competitive advantage that may be obtained by hiring a former government employee. Before hiring a candidate, contractors should have an accurate and complete understanding of the candidate's prior roles and responsibilities during government service.

If those responsibilities overlap with current or potential future procurements of interest to the contractor, the candidate should not be hired without putting in place robust mitigation measures to prevent any actual or perceived unfair competitive advantage.

These measures should include a firewall that prevents the employee from participating in any proposal development efforts that relate to their prior roles in government. This is an essential procedure that should be followed by contractors to mitigate the risk of being disqualified from a procurement. CM

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The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

ENDNOTES

1 See, e.g., 18 U.S.C. § 207; 5 C.F.R. § 1304.4605; 41 U.S.C. § 2103; 41 U.S.C. § 2104.
2 FAR § 9.505.
3 FAR § 9.505(b); FAR § 9.505-4.
4 Interactive Information Solutions, Inc., B-415126.2, et al., Mar. 22, 2018, 2018 CPD ¶ 115 at 5.
5 Id. at 6.
6 Id. at 5 (emphasis added).
7 FAR § 9.503.
8 Northrop Grumman Systems Corp., B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 7-8.
9 Serco Inc., B-419617.2, et al., Dec. 6, 2021, 2021 CPD ¶ 382.
10 Id. at 8.
11 Id. at 13.
12 Perspecta Enterprise Solutions, LLC, B-418533.2 et al., Jun. 17, 2020, 2020 CPD ¶ 213 at 7.
13 Id. at 7-8.
14 Trace Systems Inc. v. United States, 165 Fed. Cl. 44 (2023).
15 Id. at 60-61.
16 Id.
17 Skyward IT Solutions, LLC, B-421105.2, Apr. 27, 2023, 2023 CPD ¶ 108 at 7.
18 Sigmatech, Inc., B-415028.3, et al., Sep. 11, 2018, 2018 CPD ¶ 336.
19 Raytheon Intelligence & Space, Electronic Warfare Self Protect Systems, B-421672.1, et al, Aug. 17, 2023, 2023 CPD ¶ 203.
20 Id. at 11.
21 See Raytheon Co. v. United States, 170 Fed. 561 (2024).