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FEATURE COMMENT: Don't Let Post-Employment Conflicts Derail Your Contract Award

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THE GOVERNMENT CONTRACTOR[®]

Information and Analysis on Legal Aspects of Procurement

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¶ 39 FEATURE COMMENT: Don't Let Post-Employment Conflicts Derail Your Contract Award

Often referred to as “revolving door” restrictions, the U.S. Government has devised numerous laws, policies and procedures designed to combat unethical or anti-competitive conduct that may stem from a Government employee’s decision to leave federal service. The laws range from ethics restrictions designed to minimize the appearance of impropriety while a federal employee endeavors to leave the Government, to criminal laws, which seek to punish conflicts of interest and improper conduct that may occur after Government service concludes.

In addition to the ethical and criminal considerations that must be taken into account when navigating the Government’s myriad post-Government employment restrictions, in recent years, contractors have faced another growing area of risk: protests.

In numerous recent bid protests, protestors have alleged “unfair competitive advantages” stemming from Government contractors’ hiring of former Government employees—these include several high-profile examples in which the protests were sustained. These issues arise under Federal Acquisition Regulation 3.101’s “general rule ... to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.” FAR 3.101; see also *Northrop Grumman Sys. Corp.*, Comp. Gen. Dec. B-412278.7 et al., 2017 CPD ¶ 312 at 5. Although the Government Accountability Office views these as a FAR subpt. 3.1 concern, GAO’s FAR subpt. 3.1 analyses are “virtually indistinguishable” from its analyses of FAR subpt. 9.5 “unequal access to information” organizational conflicts of interest (OCIs). *Health Net Fed. Servs., LLC*, Comp. Gen. Dec. B-401652.3 et al., 2009 CPD ¶ 220 at 28 n.15. As GAO has explained:

Where a firm may have gained an unfair advantage through its hiring of a former government official, the firm can be disqualified from a competition based upon the appearance of impropriety which is created by this situation—even if no actual impropriety can be shown—so long as the determination of an unfair competitive advantage is based on hard facts and not on mere innuendo or suspicion.

Northrop Grumman Sys. Corp., 2017 CPD ¶ 312 at 5 (citing *Health Net Fed. Servs., LLC*, 2009 CPD ¶ 220 at 28; *NKF Eng’g, Inc. v. U.S.*, 805 F.2d 372 (Fed. Cir. 1986)).

To determine whether the hiring of a former Government employee creates an unfair competitive advantage, GAO considers a “variety of factors,” such as an employee’s access to non-public, competitively useful informa-

tion, *Raytheon Intel. & Space, Elec. Warfare Self Protect Sys.*, Comp. Gen. Dec. B-421672.1 et al., 2023 WL 5447382 at *8, or whether the employee actually had a role in the procurement at issue, see *Verisys Corp.*, Comp. Gen. Dec. B-413204.5 et al., 2017 CPD ¶ 338 at 8.

Given the increasing prominence of these protests, we surveyed GAO and U.S. Court of Federal Claims protest decisions to identify when those fora have found post-employment unfair competitive advantages and when they have not. Our assessment of these factors is summarized in the chart below.

In sum, we found that, in addition to providing *hard facts* demonstrating that the former Government employee (1) had access to (2) non-public, (3) competitively useful information, protests were more likely to find an “unfair competitive advantage” when they involved former Government employees who:

- were personally involved in the particular program or procurement at issue while working for the Government,
- were seeking employment with a contractor to support the particular program or contract at issue,
- supported the contractor’s proposal efforts on the relevant procurement,

- were not separated by a firewall or other efforts to mitigate the potential conflict.

In contrast, our review found that post-employment unfair competitive advantages were less likely to be found in the absence of hard facts that:

- the former Government employee actually, personally had access to information relevant to the procurement at issue,
- the relevant information was actually non-public,
- the information at issue was still up-to-date, sensitive, and of competitive use to the procurement.

Additionally, in the absence of hard facts that the former Government employee was actually, substantively, or meaningfully involved in the procurement at issue—whether while working for the Government or for the contractor—a finding of post-employment unfair competitive advantage is less likely.

“Whether the appearance of impropriety based on an alleged unfair competitive advantage exists depends on the circumstances in each case,” *Perspecta Enter. Sols., LLC*, Comp. Gen. Dec. B-418533.2 et al., 2020 CPD ¶ 213 at 5, but by being vigilant about these concerns and addressing them proactively, contractors may reduce their risk of being the subject of a protest.

POST-EMPLOYMENT OCIs	
Factors that LEAN TOWARDS a finding of a post-employment unfair competitive advantage :	Factors that LEAN AGAINST a finding a post-employment unfair competitive advantage :
<ul style="list-style-type: none"> ● The allegation of unfair competitive advantage is based on hard facts and not mere innuendo or suspicion. <i>Northrop Grumman Sys. Corp.—Mission Sys.</i>, Comp. Gen. Dec. B-419560.3 et al., 2021 CPD ¶ 305 at 7–10. 	<ul style="list-style-type: none"> ● The allegation of unfair competitive advantage is based on mere innuendo or suspicion, not on hard facts. <i>Northrop Grumman</i>, 2021 CPD ¶ 305 at 7–10; see also, e.g., <i>DynCorp Int’l, LLC, Pae Aviation & Tech. Servs., LLC, M1 Support Servs., LP</i>, Comp. Gen. Dec. B-420602 et al., 2022 CPD ¶ 163 at 17 (GAO “will not infer [without hard facts] that [Company A] had access to [Company B’s] proprietary information from the mere fact that [Company A] underbid [Company B]”).

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<ul style="list-style-type: none">● Access: Hard facts demonstrate that the former Government employee <u>actually, personally had access to</u> the specific nonpublic, competitively useful information at issue. See, e.g., <i>Serco Inc.</i>, Comp. Gen. Dec. B-419617.2 et al, 2021 CPD ¶ 382 at 8 (the former Government employee “had virtually unlimited access to [protestor’s] detailed information”).	<ul style="list-style-type: none">● Access: The protester fails to present hard facts demonstrating that the former Government employee <u>actually, personally had access to, or accessed,</u> nonpublic, competitively useful information. See, e.g., <i>DynCorp</i>, 2022 CPD ¶ 163 at 16 (there was no evidence that the former Government employee actually accessed the information).● The former Government employee “would not have had a reason to access or review this information as part of [their] duties.” Id.● The former Government employee was “not privy to” sensitive information. See <i>Dewberry Crawford Group, Partner 4 Recovery</i>, Comp. Gen. Dec. B-415940.11 et al., 2018 CPD ¶ 298 at 21.● The former Government employee was never sent the information. <i>ASRC Fed. Sys. Sols., LLC</i>, Comp. Gen. Dec. B- 420443 et al., 2022 CPD ¶ 96 at 5 (“were emailed only to a limited number of recipients ... and that Y was not one of them ... further searches of Y’s email records ... concluded that Y did not receive any such emails, and, hence, did not have access to any information regarding ... performance costs”); <i>Perspecta</i>, 2020 CPD ¶ 213 at 6 (had not been “sent acquisition planning or strategy documents”).● The former Government employee “did not have access to [any] systems where ... procurement-sensitive documentation ... financial, proprietary, or performance information” was stored. <i>Harkcon Inc.</i>, Comp. Gen. Dec. B-412936.2, 2017 CPD ¶ 110 at 3–4; see also <i>Perspecta</i>, 2020 CPD ¶ 213 at 6 (did not have “access to restricted share drives” containing planning documents, nor did they have “access to contracting databases containing ... contract performance data”).
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<ul style="list-style-type: none"> ● The information, which the former Government employee has/had access to, is both non-public AND competitively useful for the procurement. See, e.g., <i>Raytheon</i>, 2023 WL 5447382 at *6–10 (declining to override the contracting officer’s “reasonable exercise in judgment that ... the non-public information to which X had access remained competitively useful”); <i>Serco Inc.</i>, 2021 CPD ¶ 382 at 8, 13 (“had ... access to [protester’s] detailed information regarding prior costs (including burdened and unburdened labor rates), staffing, technical approach, and past performance We reject the agency’s various assertions that the information to which [former Government employees] had access, specifically including [protester’s] labor rates and the IGCE information, did not constitute non-public, competitively useful information”); <i>CACI, Inc.- Fed.</i>, Comp. Gen. Dec. B-421224 et al., 2023 CPD ¶ 35 at 9–15 (“X had broad access to non-public competitively useful information”); <i>Trace Sys. Inc. v. U.S.</i>, 165 Fed. Cl. 44, 58–61 (2023) (“[h]e possessed non-public and competitively useful information regarding CTSS III”); <i>Dell Servs. Fed. Gov’t, Inc.</i>, Comp. Gen. Dec. B-414461.3 et al., 2018 CPD ¶ 213 at 7 (“Mr. Y had access to a wide array of nonpublic, competitively useful information through his activities related to performance of the EDUCATE IV & V contract”); 60 GC ¶ 234. ● The non-public, competitively useful information would be useful for improving a proposal. <i>CACI, Inc.- Fed.</i>, 2023 CPD ¶ 35 at 16. ● The information would provide competitive insight. See <i>Peraton, Inc.</i>, Comp. Gen. Dec. B-421038.6 et al., 2023 WL 3093354 at *4. ● The information had a strong relationship to the evaluation criteria. See id. 	<ul style="list-style-type: none"> ● The information at issue was publicly available. <i>Skyward IT Sols., LLC</i>, Comp. Gen. Dec. B- 421105.2, 2023 CPD ¶ 108 at 7 (“any nonpublic pre-solicitation information to which X had access was either publicly [<i>sic</i>] available”); <i>Sci. Applications Int’l Corp.</i>, Comp. Gen. Dec. B-419961.3 et al., 2022 CPD ¶ 59 at 9 (“any non-public proprietary or source selection information to which X had access was either publically [<i>sic</i>] available”). ● The information the former Government employee had access to was not competitively useful. <i>Sigmatech, Inc.</i>, Comp. Gen. Dec. B-415028.3 et al., 2018 CPD ¶ 336 at 8; see also, e.g., <i>Skyward</i>, 2023 CPD ¶ 108 at 4–7 (“X had access to nonpublic pre-solicitation information but ... this information was not competitively useful”); <i>DynCorp</i>, 2022 CPD ¶ 163 at 1 (denying protest where “the individual in question did not have access to competitively useful information”). ● The allegedly competitively useful information is merely “high-level,” and “did not include [e.g.] individual labor rates, detailed cost data, or any other specific details that could be useful for drafting competitive proposals.” <i>DynCorp</i>, 2022 CPD ¶ 163 at 16; see also <i>Perspecta</i>, 2020 CPD ¶ 213 at 7 (“[w]hile one of the emails ... did mention costs, it did not provide any specific rate information”). ● The information at issue is arguably old, outdated, inaccurate, or stale; thus, it is not competitively useful nor does it provide meaningful benefit. See <i>Skyward</i>, 2023 CPD ¶ 108 at 4–7 (the nonpublic pre-solicitation information X had access to was “ ‘changed/ revised/ implemented’ after X left,” and this made it no longer competitively useful); <i>Peraton, Inc.</i>, 2023 WL 3093354 at *4; <i>Sci. Applications Int’l Corp.</i>, 2022 CPD ¶ 59 at 9; <i>Perspecta</i>, 2020 CPD ¶ 213 at 7 (“the protester ... has failed to explain substantively how it was of competitive use ... the emails sent to the former official were sent 4–5 years before the submission of final proposals in this procurement and 3–4 years before the agency approved a final acquisition strategy”). ● The former Government employee did not have access to contractor pricing information. <i>ASRC</i>, 2022 CPD ¶ 96 at 5. ● The former Government employee did not have access to “sensitive information regarding the source selection.” See <i>Dewberry</i>, 2018 CPD ¶ 298 at 21.
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● While employed for the Federal Government, the former Government employee was personally involved in the specific program or procurement at issue. *Raytheon*, 2023 WL 5447382 at *6 (“X was personally involved in the DBD program as a Government employee, with access to non-public and competitively useful information”); see also *Trace Systems*, 165 Fed. Cl. at 58–61 (“Mr. DeBerry supervised the day-to-day operations of the CTSS III contract, knew the GDIT proposed rates and cost estimates for projects, was briefed weekly on CTSS III changes, and was involved in GDIT staffing and labor rate discussions The contracting officer also found that CTSS IV had similar requirements as CTSS III, making Mr. DeBerry’s knowledge of CTSS III competitively useful in Plaintiff’s proposal for CTSS IV.... The contracting officer also found ... that Mr. DeBerry reviewed multiple drafts of Trace’s CTSS IV proposal ... He was still the A6X Division Chief when preliminary plans for CTSS IV began”); see also *Serco Inc.*, 2021 CPD ¶ 382 at 1, 8 (awardee “employed two recently-retired Navy captains who had been program managers for two of the program offices supported by this task order”).

● The former Government employee was not involved in the procurement or the acquisition process for the solicitation. *Verisys*, 2017 CPD ¶ 338 at 8; *Dewberry*, 2018 CPD ¶ 298 at 21–22; see also *Booz Allen Hamilton, Inc.*, Comp. Gen. Dec. B-418125 et al., 2020 CPD ¶ 28 at 9 (“the contracting officer determined that the VA employee ‘played no part in development of the requirements for HRO’... was ‘unaware of the HRO contract scope,’ ‘had no knowledge of the immediate contract requirement,’ and ‘would have had no access to the requirements information during the requirements development phase,’ because of how and where they were maintained at the OHT SharePoint site”).

● The former Government employee was not involved in the development or preparation of the solicitation. See, e.g., *MPZA, LLC*, Comp. Gen. Dec. B-421568 et al., 2023 CPD ¶ 165 at 1; *Cybermedia Techs., Inc.*, Comp. Gen. Dec. B- 420881 et al., 2022 CPD ¶ 259 at 1; *Dewberry*, 2018 CPD ¶ 298 at 22 (“[t]he record shows that this individual had no involvement with drafting the solicitation documents”); *Interactive Info. Sols., Inc.*, Comp. Gen. Dec. B-415126.2 et al., 2018 CPD ¶ 115 at 5 (“no evidence that [the individual] had any involvement in the development of the solicitation [performance work statement]”).

● The former Government employee “was employed by a different section of the procuring agency and had no involvement in the procurement at issue.” *Geo Owl, LLC*, Comp. Gen. Dec. B-420599, 2022 CPD ¶ 143 at 1, 4–5.

● The former Government employee did not have “any influence on the source selection decision.” *Interactive Info. Sols., Inc.*, 2018 CPD ¶ 115 at 5.

● “[E]ven though [the employee] oversaw ... at a high level and provided comments on drafts of some solicitation documents as a supervisor, other individuals in the agency made decisions about, drafted, and edited the solicitation documents,” and the solicitation wasn’t finalized until after the employee left the agency. *Skyward*, 2023 CPD ¶ 108 at 7; see also *Interactive Info. Sols., Inc.*, 2018 CPD ¶ 115 at 5 (the former chief of staff, while serving in a supervising role, “never signed or reviewed any information technology contract actions for [the agency]”).

● The former Government employees departed the agency before procurement planning began. See, e.g., *Cybermedia*, 2022 CPD ¶ 259 at 1; see also *ASRC*, 2022 CPD ¶ 96 at 6.

● “[A] person’s mere familiarity with the type of work required is not, by itself, evidence of an unfair competitive advantage. See, e.g., [*Geo Owl, LLC*, 2022 CPD ¶ 143 at 4–5] (former employee’s position was in a separate division); [*Perspecta*, 2020 CPD ¶ 213 at 8] (former employee’s position was not within acquisition team’s chain of command).” *Raytheon*, 2023 WL 5447382 at *8.

<ul style="list-style-type: none"> ● The former Government employee was seeking and accepting employment with the contractor to support the contract, which they had been personally involved with while employed by the Government. See <i>Raytheon</i>, 2023 WL 5447382 at *6; see also <i>Serco Inc.</i>, 2021 CPD ¶ 382 at 8 (“it cannot be meaningfully disputed that Jones and Smith were recruited and hired—either before or shortly after leaving government employment—by BAH’s subcontractors to assist in BAH’s proposal preparation efforts”). 	<ul style="list-style-type: none"> ● “[T]he protester fails to establish hard facts demonstrating that the official was ever employed by the awardee.” <i>Geo Owl, LLC</i>, 2022 CPD ¶ 143 at 1.
<ul style="list-style-type: none"> ● The former Government employee supported the contractor’s proposal efforts. See <i>CACI-Fed.</i>, 2023 CPD ¶ 35 at 16; <i>Trace Systems</i>, 165 Fed. Cl. at 58–61; <i>Raytheon</i>, 2023 WL 5447382 at *10–11; <i>Serco Inc.</i>, 2021 CPD ¶ 382 at 8 (“no dispute that Jones and Smith engaged in comprehensive proposal preparation activities on behalf of BAH”); <i>Dell Servs. Fed. Gov’t, Inc.</i>, 2018 CPD ¶ 213 at 1 (“individual participating in the preparation of awardee’s proposal”). 	<ul style="list-style-type: none"> ● The former Government employee was not involved in the development or preparation of the awardee’s proposal in response to the solicitation. See <i>MPZA, LLC</i>, 2023 CPD ¶ 165 at 1; <i>Geo Owl, LLC</i>, 2022 CPD ¶ 143 at 1. ● The former Government employee “did not provide any specific information to [their employer] for use within the preparation of its quotation that would convey an unfair competitive advantage.” See <i>Booz Allen Hamilton, Inc.</i>, 2020 CPD ¶ 28 at 9.
<ul style="list-style-type: none"> ● No evidence that the contractor took steps to limit the scope of the former Government employee’s input to the contractor’s proposal, e.g., formal firewalling procedures or other contemporaneously documented actions. See <i>Raytheon</i>, 2023 WL 5447382 at *10–11; see also <i>Serco Inc.</i>, 2021 CPD ¶ 382 at 8 (“the contemporaneous record does not provide any indication that BAH or its subcontractors placed limitations on the scope of the information they provided. Rather, the record reflects BAH’s and/or its subcontractors’ broad requests for Jones’s and Smith’s proposal input”). ● The former Government employee’s activities with the firm were likely to have resulted in the disclosure of such non-public, competitively useful information. <i>Northrop Grumman Sys. Corp.—Mission Sys., Comp. Gen. Dec. B-419557.2 et al.</i>, 2021 CPD ¶ 329 at 6. 	<ul style="list-style-type: none"> ● The nonpublic information was not in fact available to the firm. <i>Sigmatech, Inc.</i>, 2018 CPD ¶ 336 at 8.
	<ul style="list-style-type: none"> ● “[All] qualified offerors with an acceptable proposal, and a fair and reasonable price, were to receive an award, and thus there [appeared] to be little risk of an unfair competitive advantage from these actions at [that] stage in the procurement.” <i>Obsidian Sols. Grp., LLC</i>, Comp. Gen. Dec. B- 417134 et al., 2019 CPD ¶ 156 at 1; 61 GC ¶ 182.

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