

REVOLVING DOOR UNFAIR COMPETITIVE ADVANTAGE

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I. Introduction

A. The contracting officer is charged with protecting the integrity of the procurement process and is to prevent not only actual conflicts of interest, but also the appearance of conflict of interest or other appearance of impropriety. FAR 3.101-1. An offeror can be disqualified based on an unfair competitive advantage it obtains by hiring and using in its proposal preparation a former agency official who, during his government service, had had access to non-public, competitively useful information, either proprietary information of a competitor or source selection sensitive information. See *NKF Engineering, Inc. v. U.S.*, 805 F.2d 372 (Fed. Cir. 1986; *Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc.*, B-235906 *et al.*, Oct. 26, 1989, 89-2 CPD ¶ 379, *aff'd.* *Brown Assocs. Mgmt. Servs., Inc.—Recon.*, B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299.

B. The Government Accountability Office (GAO) recently re-confirmed the validity of this protest theory and, based on *prima facie* evidence of a revolving door unfair competitive advantage developed during discovery and a lengthy hearing, recommended that the contracting officer conduct a thorough investigation of a contract awardee's use of a former agency Chief of Staff in its successful proposal preparation. *Health Net Federal Services, LLC*, B-401652.3 *et al.*, Nov. 4, 2009, 2009 CPD ¶ 220.

II. Factual Background

A. DOD's TRICARE Management Activity (TMA) awards contracts for the delivery of health care services to spouses and dependents of active duty service members and retirees nationwide. Health Net Federal Services, LLC (HNFS) had been the incumbent for the prior North Region contract with roughly 3 million beneficiaries, and the follow-on contract was valued at \$15-20 billion over 6 years.

B. The awardee hired the former Chief of Staff to the TMA Administrator and the former Chief of Staff immediately went to work on the awardee's proposal. No firewalls were established limiting his involvement to any particular parts of the proposal, and evidence established some involvement by him in preparation of several sections of the proposal.

C. The GAO decision discusses three kinds of non-public, allegedly competitively sensitive information to which the evidence showed the individual had had access during his government employment and which was alleged to be relevant to, and competitively useful for, the protested procurement.

1. As Chief of Staff he had access to non-public Health Net pricing and staffing and technical approach enhancements under the incumbent contract that were relevant to the follow-on competition. Based on this access alone, GAO held that Health Net had established a *prima facie* case of an unfair competitive advantage and an appearance of impropriety that required the contracting officer to investigate and determine what action should be taken.

2. As Chief of Staff he received materials for, and attended, meetings of a committee of high level DOD and TMA officials who were to develop the policy and goals for the procurement, discuss problems and weaknesses in the program, alternative approaches and solutions, and pros and cons and impacts of particular approaches. Health Net argued that, although these discussions preceded issuance of the RFP, they would have provided to the Chief of Staff insights into the agency's real preferences. TMA essentially argued that pre-RFP discussions of a high level nature cannot provide an unfair competitive advantage because offerors have to propose against the RFP, which is, of course a public document. GAO did not resolve the issue.

3. The individual in question also served as the Source Selection Authority for another TMA procurement, the TRICARE Dual Eligible Fiscal Intermediary Contract (TDEFIC), which was awarded a few months before the individual in question began his employment with the awardee. TDEFIC is a contract to process claims relating to individuals eligible for both the TRICARE program and Medicare. There also was a significant claims processing function in the protested procurement. The two offerors in TDEFIC were the same two companies proposed as the claims processing subcontractors in the protested procurement by Health Net and the awardee. Obviously as the SSA in TDEFIC the individual in question had extensive access to, and knowledge of, the proposals of those two companies and the TMA evaluations thereof. Therefore the primary argument, unresolved by GAO, was whether the two procurements were sufficiently similar and closely related that the TDEFIC information would be competitively useful in preparing a proposal in the protested procurement.

III. Key Holdings

A. Appearance of impropriety arising from an unfair competitive advantage derived from former government employee's access to, and knowledge of, non-public, competitively useful, proprietary or source selection sensitive information is a separate protest cause of action from alleged violations of the

Procurement Integrity Act (PIA), which focus on alleged disclosures of certain types of information, or of Organizational Conflicts of Interest (OCI). In particular, the PIA requirement that notice be given to the agency within fourteen days of the discovery of a possible or potential PIA violation is not applicable to a revolving door unfair competitive advantage protest.

B. The GAO analysis of a revolving door unfair competitive advantage protest will track that applied to an unequal access to information OCI. Significantly, in either case, once it is demonstrated that the offeror (or the former government employee) had access to non-public proprietary or source selection sensitive information, unless mitigated, an unfair competitive advantage will be presumed without the need for any inquiry into whether the information was in fact used in the proposal. *L-3 Servs.*, B-400134.11 *et al.*, Sept. 3, 2009, 2009 CPD ¶ 171; *Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129.

C. By contrast, in *Academy Facilities Management--Advisory Opinion*, B-401094.3, May 21, 2009, 2009 CPD ¶ 139, GAO advised the Court of Federal Claims that it would have denied a post-award “unfair competitive advantage” protest. That protest alleged that a former government official who had had some responsibility for overseeing protester’s performance of the incumbent contract was now employed by the awardee and had utilized in the follow-on procurement non-public information he had gained about the protester. GAO denied the protest for lack of proof regarding any specific competition sensitive information and rejected the protester’s assertion that the agency should be required to “prove a negative”—*i.e.* prove that the former employee did not have access to relevant non-public information. Thus GAO seems to distinguish the presumption of prejudicial use of information once access and knowledge of relevant nonpublic information is established, from the objective threshold determination of whether the former employee actually had had access and/or knowledge of non-public, competitively useful proprietary or source selection information.

D. Although the individual in question had obtained so-called “clean letters” from the TMA ethics official relating to post-employment statutory restrictions, GAO held those letters provided no protection. The last letter referring to the specific procurement had explicitly noted the Contracting Officer’s separate responsibility to protect the integrity of the procurement process and to prevent unfair competitive advantage and suggested that the contracting officer should be contacted if there were any concerns. No such contact was made.

IV. Practical Ramifications

A. Given the separate responsibility of the Contracting Officer to protect the integrity of the procurement process, offerors should not rely on “clean” letters

from agency ethics officials as blanket approvals of use of the individuals in proposal strategy or preparation, even if those letters do not call out the contracting officer's separate authority.

B. Given the rationale for the revolving door unfair competitive advantage doctrine and the unequal access to information organizational conflicts of interests, contractors should be careful about hiring and using in proposal strategy or preparation the former employees of other government contractors who may have had access to non-public, competitively useful offeror proprietary or source selection information.