

28th Annual Ounce of Prevention Seminar

# Welcome

## Predicting the Future: Federal Contracting in an Election Year

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# HIRING FORMER GOVERNMENT EMPLOYEES: Recent Developments

Peter J. Eyre

# Hiring Former Government Officials

- Common Fact Pattern
  - Bidder hires former government official to assist in drafting its proposal
  - During employment at agency, official attended procurement planning meetings, participated in development of requirements, and had access to early planning documents
  - Former government official obtains so-called “clean letter” from the Designated Agency Ethics Official
  - No firewall implemented and bidder allows former government official to help craft proposal
  - CO disqualifies offeror because of unfair competitive advantage or GAO sustains protest if disappointed offerors challenge award to bidder that used former government official during proposal preparation

# Unfair Competitive Advantage

- Unfair competitive advantage like “unequal access to information” OCIs where access to competitively advantageous nonpublic information is acquired from a former government official who has relocated to the private sector
  - Technically, these types of cases are not OCIs because the information was not acquired by the firm in its performance of a separate federal contract
  - But the harm to the fairness of the procurement process is the same
- To avoid tainting the proposal drafting team and risking disqualification of the firm from the procurement, former government officials with inside knowledge of a particular procurement or contract program should be firewalled
- Key Case: Health Net Federal Services, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220

# Recent Unfair Competitive Advantage Decisions: No Need To Show Actual Benefit

- TeleCommunication Systems Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229
  - GAO denied protest challenging agency's decision to disqualify offeror because of employment of a former government official
  - Former agency official had attended high-level procurement planning meetings at which key acquisition strategy decisions were made and received nonpublic acquisition sensitive information

# Recent Unfair Competitive Advantage Decisions: No Need To Show Actual Benefit

- TeleCommunication Systems Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 (cont'd)
  - Former official assisted in revising the awardee's proposal during corrective action
  - After conducting investigation, contracting officer concluded that it was not clear if awardee had benefited from an unfair competitive advantage, but that there was an appearance of impropriety that could not be avoided, neutralized, or mitigated, and GAO upheld the agency decision to disqualify



# Recent Unfair Competitive Advantage Decisions: CO Investigation Cannot Be Based On Assumptions

- VSE Corp., B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268
  - GAO sustained protest filed by offeror excluded from competition based on appearance of impropriety arising from its hiring of a former senior official of the procuring agency
  - GAO found agency's disqualification decision to be unreasonable even though the contracting officer had conducted a significant investigation into the facts and documented her findings

# Recent Unfair Competitive Advantage Decisions: CO Investigation Cannot Be Based On Assumptions

- VSE Corp., B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268  
(cont'd)
  - GAO concluded that an investigation into an unfair competitive advantage and/or appearance of impropriety must be reasonable, and the conclusions reached must follow from the facts revealed during the investigation
  - CO had made numerous adverse assumptions against the former government official, had reached certain conclusions that conflicted with the testimonial evidence she had gathered, and had applied an erroneous understanding of the post-employment restrictions in 18 U.S.C. § 207



# Revolving Door Representation

- New DFARS clause: “Representation relating to compensation of former DoD Officials” (252.203-7005)
- Effective on November 18, 2011
- Requires offerors submitting proposals to DoD to represent whether former DoD officials receiving compensation from the offeror are in compliance with post-employment restrictions
- Scope of the representation is limited to individuals that will have a role on any resulting contract
- Excludes commercial items

# Revolving Door Representation

- Language of the clause:

“By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all covered DoD officials employed by or otherwise receiving compensation from the offeror, and who are expected to undertake activities on behalf of the offeror for any resulting contract, are presently in compliance with all post-employment restrictions covered by 18 U.S.C. 207, 41 U.S.C. 2101–2107, and 5 CFR parts 2637 and 2641, including Federal Acquisition Regulation 3.104–2.”

# Revolving Door Representation

- Covered DoD Official is defined as an individual that:
  - Leaves or left DoD service on or after January 28, 2008; and
  - Serves or served in DoD in one of the following positions: program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of \$10 million

# Revolving Door Representation

- Substantive restrictions:
  - Many former government employees have “post-employment” or “revolving door” restrictions that restrict:
    - The companies they can work for and
    - The types of work assignments they may perform and positions that they may accept within the private sector
  - Compensation bans
  - Representation bans
  - Requirement to obtain ethics opinion prior to receiving compensation

# Hiring Former Government Officials

- Implications and Best Practices
  - Beware of so-called “clean letters” from Designated Agency Ethics Officials
  - Screening process
  - Incorporate key concepts into HR policies/procedures
  - If mitigation is required or advisable in connection with particular procurement, seek approval from contracting officer
  - When in doubt, establish firewall to separate former government official from business capture effort, including proposal preparation