



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Comptroller General
of the United States

Decision

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Matter of: Serco Inc.

File: B-419617.2; B-419617.3

Date: December 6, 2021

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DIGEST

Protest that awardee gained an unfair competitive advantage in preparing its proposal by using information provided by former high-level agency officials is sustained where, after taking corrective action to investigate an allegation of an unfair competitive advantage conflict of interest, the agency unreasonably concluded that the information to which the former officials had access, as well as information that was demonstrably provided to the awardee, did not constitute non-public, competitively useful information.

DECISION

Serco, Inc., of Herndon, Virginia, protests the Department of the Navy's award of a task order to Booz Allen Hamilton, Inc. (BAH), of McLean, Virginia, pursuant to request for proposals (RFP) No. N0016419R3504, to provide professional support services for the Deputy Commander for Surface Warfare (referred to as "SEA 21").¹ Serco challenges the award on the basis that BAH and/or its teaming partners employed two

¹ SEA 21 "is a matrixed organization of [four] program offices that manage the lifecycle maintenance and modernization of all non-nuclear U.S. Navy surface ships." Agency Report (AR) Tab 1, RFP at 6. These organizations require program management, technical, and business/financial support, and the contractor is required to "work closely with program personnel," engaging in "[f]requent coordination" with, and reporting to, "the respective Program Offices." Contracting Officer's Statement and Memorandum of Law (COS/MOL), Sept. 27, 2021, at 2.

recently-retired Navy captains who had been program managers for two of the program offices supported by this task order, and that these and other Navy personnel improperly provided material assistance to BAH in preparing its proposal by giving BAH access to non-public competitively useful information. Accordingly, Serco asserts that, pursuant to the Federal Acquisition Regulation (FAR) provisions regarding conflicts of interest,² BAH's proposal should have been disqualified from the competition.

We sustain the protest.

BACKGROUND

Prior Task Order

This procurement is a follow-on to the current SEA 21 task order being performed by Serco.³ The solicitation explains that the contractor will provide support for four SEA 21 program offices: surface ship modernization (PMS 407); surface ship in-service readiness (PMS 443); surface training systems (PMS 339); and inactive ships (SEA 21I).⁴ RFP at 6. Of relevance to this protest, former Navy Captain John Jones served as the program manager for PMS 443 (readiness) from June 2015 to May 2018, and former Navy Captain Sam Smith served as the program manager for PMS 339 (training) from August 2014 through June 2017.⁵ AR, Tab 20, encl. 16, Jones Declaration at 1; Tab 20, encl. 16, Smith Declaration at 1. During those periods, Serco/Alion was the incumbent contractor and, as such, was required to submit monthly

² Subparts 9.5 and 3.1 of the FAR prohibit conflicts of interests in government procurements and establish the following principle: "Government business shall be conducted in a manner above reproach. . . . The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships." FAR 3.101.

³ The current task order was awarded to a subsidiary of Alion Sciences and Technology, Inc. in 2014; in 2019, Serco acquired the Alion subsidiary and the task order was novated to Serco. Protest at 9 n.3.

⁴ The requirements related to SEA 21I (inactive ships) are "minimal," and the tasks supporting PMS 407, PMS 443, and PMS 339 constitute "the largest amount of work." AR, Tab 20, encl. 28, Interview of Contracting Officer's Representative (COR) at 1; AR, Tab 12, Best Value Determination at 5. The responsibilities of PMS 407 include "ship modernization . . . availability planning . . . [and] maintenance support as required by PMS 443"; the responsibilities of PMS 443 include "providing immediate response to a crisis [and] long-term strategic support"; and the responsibilities of PMS 339 include "validating all surface training systems." RFP at 6.

⁵ GAO does not generally disclose the names of specific individuals. Here, and throughout this decision, we use the pseudonyms "Jones" and "Smith" to refer to the program managers for PMS 443 and PMS 339, respectively.

reports documenting various aspects of its task order performance.⁶ See Protest exhs. 8-12, Monthly Reports. The monthly reports included the labor rates (both burdened and unburdened), names, positions, and number of hours worked, for each employee who had performed under the task order during the reporting period. *Id.*; AR, Tab 20, Memo of Investigation at 24. There is no dispute that, as program managers, Mr. Jones and Mr. Smith had access to these reports. *Id.* at 24-25, 32; Tab 20, encl. 28, Interview of COR at 1-2. In addition to the monthly reports, Serco participated in weekly meetings with the program managers to discuss matters relevant to Serco's ongoing contract performance. AR, Tab 20, encl. 28, Interview of COR at 1-2. Finally, the program managers had access to Serco's past performance information in the contractor performance assessment reporting system (CPARS). *Id.* at 2.

BAH's Proposal Preparation Efforts

In March 2018, BAH began its "formal capture efforts" for the then-pending recompetition of the SEA 21 task order.⁷ AR, Tab 20, encl. 15, attach. A, Declaration of BAH Capture Manager at 1. As set forth in more detail below, each program manager left government service and was immediately employed by a firm that was teamed with BAH for purposes of winning the SEA 21 task order. Although the details differ somewhat, both played significant roles in the proposal preparation efforts.

Efforts Involving Mr. Jones

On May 4, 2018, Mr. Jones (prior program manager for PMS 443) started a period of terminal leave⁸ from the Navy.⁹ On June 12, BAH executed a teaming agreement with Hepburn and Sons, LLC, "to develop the best management and technical approach to preparing a proposal to support the [SEA 21 task order] Recompete."¹⁰ AR, Tab 20,

⁶ In addition to providing detailed information regarding the tasks performed, the reports included descriptions of "significant achievements" and/or "problem areas encountered and anticipated." See Protest, exhs. 8, 10, Monthly Reports.

⁷ BAH had competed for, and lost, the 2014 competition. BAH states that it "has anticipated pursuing any recompete of that contract opportunity ever since." AR, Tab 20, encl. 15, attach. A, Declaration of BAH Capture Manager at 2.

⁸ We understand that terminal leave "is just like regular leave except that members aren't required to report back to their duty station after completion of the leave." See www.militarypay.defense.gov (last visited December 2, 2021).

⁹ He formally retired from the Navy on August 31, 2018.

¹⁰ Among other things, the teaming agreement provided for the companies' exercise of their "mutual effort . . . to enhance the likelihood of a Prime Contract award to [BAH].)" AR, Tab 20, encl. 16, Teaming Agreement (Hepburn) at 1.

encl. 16, Teaming Agreement (Hepburn) at 1. On June 25, Jones began “part time” employment with Hepburn & Sons, LLC as “Director of Advisory Services.”¹¹ AR, Tab 20, encl. 16, Jones Declaration at 1. As discussed in more detail below, Jones immediately began meeting with the BAH representatives who would subsequently prepare BAH’s proposal. For example, on July 10, Jones met with BAH’s capture manager to “describe[] some of the activities of and issues faced by the program offices supported under the SEA 21 contract.” *Id.* at 2; AR, Tab 20, Memo of Investigation at 7. During that meeting, Jones advised BAH personnel that: Serco was “not providing consistent delivery”;¹² “[v]acant positions are an issue”; and Serco “doesn’t do cyber well.”¹³ AR, Tab 20, encl. 15, Notes of July 10 Meeting at 1-2. Subsequently, Jones “participated in Hepburn’s recruitment efforts to fill key personnel slots.”¹⁴ AR, Tab 20, encl. 16, Jones Declaration at 3.

Efforts Involving Mr. Smith

On March 9, 2018, BAH executed a non-disclosure agreement with CDI Government Services to “facilitate exploration of future business opportunities.” AR, Tab 20, Memo of Investigation at 11; Tab 20, encl. 16, Smith Declaration at 3; Tab 20, encl. 15, attach. U, Non-Disclosure Agreement (CDI). On June 15, Mr. Smith (prior program manager for PMS 339) started a period of terminal leave from the Navy. Tab 20, encl. 16, Smith Declaration at 1. In July, Smith was hired by CDI as its Operations

¹¹ On September 1, 2018, the day after his retirement, Jones became a full time employee in that position and is currently so employed. AR, Tab 20, encl. 16, Jones Declaration at 1.

¹² More specifically, in subsequent comments on BAH’s draft proposal, Jones stated that “SEA 21 was not built for ACAT [acquisition category] style acquisition, so when it arises, such as the MCRRS [mobile cleaning recovery and recycling system] program, strong contractor support is key, and has been marginal by the current incumbent here.” AR, Tab 20, encl. 15, attach. Q, BAH Draft Proposal at 3. Similarly in providing comments on BAH’s draft proposal regarding the solicitation’s readiness requirements, Jones stated: “incumbent uses a subcontractor to support Logistics, and it has not been a success story,” adding “[s]trong win-themes here will do well for us.” *Id.* at 8.

¹³ BAH’s capture manager stated that “[he] thought that this presented a good opportunity for [BAH] in light of the Navy’s increased cyber activity that Jones had been describing.” AR, Tab 20, encl. 15, attach. A, Declaration of BAH Capture Manager at 3.

¹⁴ Hepburn’s teaming agreement with BAH provided that, as part of the proposal preparation effort, Hepburn would provide certain personnel “who are committed and will be made available to support the [p]rogram.” AR, Tab 20, encl. 16, Teaming Agreement (Hepburn) at 11. Jones described his recruiting activities as “communicating with individuals I know to make them aware of the contract opportunity and to inquire whether they might be interested in working for Hepburn as a subcontractor to [BAH].” AR, Tab 20, encl. 16, Jones Declaration at 3.

Center Manager/Capture Manager.¹⁵ *Id.* On August 2, BAH executed a teaming agreement with CDI (virtually identical to the BAH/Hepburn teaming agreement) providing that CDI would assist BAH in “pursu[ing] the SEA 21 recompete contract opportunity.” AR, Tab 20, encl. 15, Declaration of BAH Capture Manager at 3; AR, Tab 20, encl. 15, attach. V, Teaming Agreement (CDI).

Beginning in September 2018, Smith met with BAH personnel to provide assistance in BAH’s ongoing efforts to compete for the SEA 21 task order. Among other things, Smith provided input related to the solicitation’s “manpower-related tasking requirements.” AR, Tab 20, encl. 16, Smith Declaration at 2. In October 2018, Messrs. Smith and Jones met to discuss staffing requirements. *Id.* at 3. Subsequently, Smith left CDI and accepted employment with Hepburn where he continued to assist BAH in its proposal preparation, including “confirming the availability of bid Key Personnel.” *Id.* at 3-4.

Involvement of Other Navy Personnel

In addition to the activities of Jones and Smith, the record establishes that the contracting officer’s representative (COR) for the prior task order met with BAH representatives on April 4, 2018.¹⁶ During that meeting the COR provided information to BAH regarding the agency’s independent government cost estimate (IGCE).¹⁷ AR, Tab 20, encl. 28, Interview of COR at 4; Tab 20, encl. 28, Notes of April 4, 2018 Meeting at 1-2. Specifically, the record establishes that, during the April 4 meeting, the COR told BAH representatives that: Serco was “going to exceed ceiling”; “[t]he value of

¹⁵ The record establishes that, as early as March 13, 2018, Smith expected CDI to participate in the SEA 21 task order recompetition, and that he (Smith) “may be asked to be part of the planning for that teaming effort.” AR, Tab 20, encl. 33, attach. 2, Smith Emails.

¹⁶ BAH’s capture manager states that, “[i]n February 2018, I developed a comprehensive office call plan to enhance our capture efforts that included 16 formal office calls with various members of all SEA 21 program offices and the COR.” AR, Tab 20, encl. 15, attach. A, Declaration of BAH Capture Manager at 2-3. In this context, BAH representatives met with, among others, the agency employees who would serve as the source selection authority and source selection evaluation board chair for the task order recompetition. AR, Tab 20, encl. 15, attach. H, Reports of Navy Contacts. BAH’s capture manager elaborates that, the purpose of these meetings was to “gain a better understanding of,” among other things, “the issues and challenges confronting the affected programs,” and acknowledges that, during these meetings Navy officials provided information “about the incumbent contractor’s performance.” AR, Tab 20, encl. 15, attach. A, Declaration of BAH Capture Manager at 2-3.

¹⁷ The IGCE itself was not disclosed to offerors as part of the solicitation, and the COR states that “Serco cost data was used [along with other data] to formulate the IGCE.” AR, Tab 20, encl. 28, Interview of COR at 3.

the next award will increase to \$400M[illion]”; and “[t]here will be a 20% surge CLIN [contract line item number]” of “\$80M[illion].”¹⁸ AR, Tab 20, encl. 28, Interview of COR at 3-5; Tab 20, encl. 28, Notes of April 4, 2018 meeting at 1-2.

Submission of Proposals, Evaluation, and Award

On August 13, 2018, the agency issued a sources sought notice that included a draft statement of work (SOW) for the SEA 21 task order recompetition; on July 29, 2019, the agency issued the solicitation to contractors holding indefinite-delivery, indefinite-quantity (IDIQ) contracts under the Navy’s SeaPort Next Generation program. AR, Tab 1, RFP. The solicitation contemplated the award of a cost-plus-fixed-fee task order with a 1-year base period and four 1-year option periods, and provided that award would be based on a best-value tradeoff that reflected consideration of the following evaluation factors, listed in descending order of importance: technical/management approach;¹⁹ past performance; small business subcontracting approach; and cost/price.²⁰ RFP at 79-85.

On or before the September 24, 2019 closing date, proposals were submitted by Serco and BAH;²¹ thereafter, the proposals were evaluated and assigned the following ratings.²²

¹⁸ Ultimately, the agency established an IGCE of [deleted]. *Id.* at 4.

¹⁹ Under technical/management evaluation factor, the solicitation established four subfactors, listed in descending order of importance: (a) technical capabilities/approach; (b) technical sample scenarios; (c) personnel requirement (d) staffing plan; and (e) management approach. Subfactors (c) and (d) were of equal importance. RFP at 80-81.

²⁰ The solicitation contained a staffing table that identified labor categories, education/experience requirements, and a recommended labor mix allocation, COS/MOL, Sept. 27, 2021, at 4; RFP at 68-80; required offerors to propose applicable labor rates; and provided that an offeror’s total evaluated cost/price would “be the sum of the realistic costs for the base year and all option years, including proposed fees.” RFP at 85.

²¹ Serco and BAH were the only offerors.

²² Under the technical/management and small business factors, the agency assigned adjectival ratings of outstanding, good, acceptable, marginal, and unacceptable. RFP at 81. Under the past performance factor, the agency assigned adjectival ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, and/or unknown confidence. *Id.* at 82.

	Serco	BAH
Technical/Management	Good	Good
Past Performance	Substantial Confidence	Substantial Confidence
Small Business	Acceptable	Acceptable
Total Evaluated Cost/Price	\$428,093,678	\$371,914,532

AR, Tab 12, Best-Value Determination at 4.

While the agency rated both proposals as good under the most important factor, technical and management approach, it viewed BAH's proposal as superior based on various evaluated strengths, including strengths for "data analytics" and "manpower, personnel, and training." AR, Tab 10, Technical Evaluation Team (TET) Report at 8. After considering the strengths and weaknesses of each proposal, and noting that BAH's cost/price was approximately 15 percent lower than Serco's cost/price,²³ the source selection authority concluded that "BAH's proposal presents the better technical capability and the lower cost . . . making it the best value to the Government." AR, Tab 12, Best-Value Determination at 12. On February 5, 2021, the agency awarded the task order to BAH.

On February 23, Serco filed a protest with this Office challenging the integrity of the source selection process, asserting that the agency had failed to reasonably consider the unfair competitive advantage obtained by BAH through its access to, and use of, non-public, competitively useful information. On March 12, the agency stated that it would take corrective action by investigating Serco's allegations. On March 29, we dismissed Serco's February 23 protest, pending the agency's corrective action.

By letter dated August 20, 2021, the agency notified this Office and counsel for the parties that it had completed its investigation and "found no evidence that current or former government employees provided BAH with unequal access to non-public, competitively useful information that would have provided it with an unfair competitive advantage." Notice of Investigation Results, Aug. 20, 2021 at 2. Accordingly, the agency stated that "the prior task order award to BAH remains unchanged." *Id.* This protest followed.²⁴

²³ The record establishes that BAH's lower cost/price reflected lower labor rates. See AR, Tab 11, Cost Evaluation Team Report.

²⁴ Because the value of the task order is over \$25 million, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts awarded under the authority granted in Title 10 of the United States Code. 10 U.S.C. § 2304c(e)(1)(B).

DISCUSSION

Serco protests that the task order award to BAH was based on BAH's and/or the agency's improper actions which created an unfair competitive advantage. More specifically, Serco protests that BAH's proposal reflected its access to non-public, competitively useful information gained through BAH's multiple communications with agency personnel, specifically including Jones and Smith who actively and materially participated in the preparation of BAH's proposal shortly after they retired from the Navy.²⁵ Protest, Aug. 27, 2021, at 23-46; Supp. Protest and Comments, Oct. 7, 2021, at 4-34.

First, Serco notes that, as program managers for PMS 443 and PMS 339, Jones and Smith had virtually unlimited access to comprehensive and detailed non-public information regarding Serco's: costs, staffing, technical approach, and past performance. More specifically, and as noted above, the program managers had access to Serco's proprietary information including the burdened and unburdened labor rates, names, positions, and number of hours worked, for each employee who had performed under the prior task order.²⁶ Serco further maintains that Jones and Smith had access to detailed information regarding Serco's past performance and its technical approach to performing the various task order requirements through the monthly reports, the discussions that occurred during the program managers' weekly meetings, and the program managers' access to CPARS information. Serco further notes that, when questioned regarding this information, the agency's COR expressly stated that knowledge of the information in Serco's monthly reports, including burdened and unburdened labor rates "would [be] useful to a competitor." See AR, Tab 20, encl. 28, Interview of COR at 1.

Next, Serco notes that, either before or immediately following retirement, Jones and Smith were recruited by BAH and/or its teammates for the express purpose of assisting

²⁵ Serco also protests other aspects of the agency's evaluation and source selection decision. In light of our decision that it was unreasonable for the agency to find "no evidence that current or former government employees provided BAH with unequal access to non-public, competitively useful information," see Notice of Investigation Results, Aug. 20, 2021 at 2, our decision does not address Serco's additional challenges to the source selection process.

²⁶ With regard to staffing, Serco also refers to specific portions of the record establishing that both Jones and Smith were involved in Serco's hiring decisions under the prior task order. For example, the record contains a November 2, 2017 email from the Navy COR to Jones, requesting that Jones concur with Serco's proposal to hire a specific individual at a specified labor rate. Protest, exh. 13, Emails Regarding Hiring Decision. Similarly, the record establishes that Smith "would review the total cost of [proposals to hire contractor personnel] and provide feedback to the Contracting Officer's Representative prior to accepting them." AR, Tab 20, encl. 33, attach. 2, Smith Emails.

in BAH's proposal preparation effort.²⁷ As a general matter, there is no dispute that both Smith and Jones were part of BAH's "silver team,"²⁸ and that Jones took part in BAH's "pink team" and "red team" reviews.²⁹ AR, Tab 20, encl. 16, Jones Declaration at 3-5; AR, Tab 20, encl. 16, Smith Declaration at 2.

More specifically, Serco identifies multiple specific examples, documented in the agency record, that establish Jones's and Smith's involvement in BAH's proposal preparation efforts, noting that neither BAH or its teammates imposed any limitations on the input they provided. For example, on September 14, 2018, Jones met with BAH personnel and "prepared a whiteboard outline of PMS 443's processes and prepared a walkthrough tutorial on PMS 443's work as it related to [s]olicitation Task 4.2, Readiness Management Support." AR, Tab 20, encl. 16, Jones Declaration at 2. On September 24, Jones spoke with a BAH representative and "shar[ed] information about Navy operations and requirements." *Id.* On September 27, Jones sent an email to another BAH representative, responding to a request to "identify issues that would be important to SEA 21 leadership." *Id.*

On September 27, 2018, Smith "sent an email to [a BAH representative] providing [his] thoughts on SEA 21 important issues," and during September and October 2018, he communicated and/or met with BAH personnel to "provide input" regarding the solicitation's "manpower-related tasking requirements." AR, Tab 20, encl. 16, Smith Declaration at 2.

On October 2, Jones "participated in a meeting with [BAH] personnel . . . as part of a 'Silver Team' activity to consider what support was necessary to fulfill the requirements of [the solicitation's] Task 4 . . . which related to PMS 443." AR, Tab 20, encl. 16, Jones Declaration at 3-5. On October 11, Jones "participated in a telephone conference with [BAH] to discuss SOW requirements regarding the Lifecycle Management Group

²⁷ As noted above, in March 2018, three months before going on terminal leave from the Navy, Smith stated that he expected CDI to participate in the SEA 21 task order recompetition, and anticipated that he (Smith) "may be asked to be part of the planning for that teaming effort." AR, Tab 20, encl. 33, attach. 2, Smith emails.

²⁸ The silver team's efforts "involved using bullets, tables, flow charts, etc., to show how work described in a SOW subtask could be accomplished, and to ensure that each item listed in the subtask is addressed." AR, Tab 20, encl. 15, Jones Declaration at 3.

²⁹ We infer from the record here that the "red team" review related to recommendations for proposal improvements that took place near the end of the proposal preparation process, while the "pink team" review related to proposal validation/correction efforts that took place earlier in the process.

[LCMG].”³⁰ *Id.* On October 26, Jones met with Smith to prepare “staffing approaches” for “a meeting with BAH.” *Id.* at 4.

On May 20, 2019, Jones participated in a telephone call with BAH’s capture manager to discuss “technical inputs” for BAH’s proposal; thereafter, Jones provided written comments, making suggestions that he believed would make BAH’s proposal “more responsive.”³¹ *Id.* at 4. On May 21, 2019, Jones “provided inputs and comments related to Task 2 in the Solicitation.” *Id.* On August 2, 2019, Jones “participated in a conference call focused on the technical scenarios and sample tasks in the Solicitation.” *Id.* From August 21, 2019 to August 23, 2019, Jones “participated in the Pink Team review of [BAH’s] draft technical proposal, providing comments about leadership, catchphrases being used, and asking questions about the team.” *Id.* at 5. From September 9, 2019 to September 11, 2019, Jones “participated in the Red Team Review of [BAH’s] draft technical proposal.” *Id.* On September 17, Jones “draft[ed] a paragraph” for BAH’s proposal that “tie[d] [BAH’s] data analytics and AI [artificial intelligence] capabilities to SEA 21 initiatives.” *Id.*

In addition to the specific activities of Jones and Smith, Serco points to other documented examples, regarding non-public, competitively useful information that BAH obtained during its proposal preparation efforts. For example, in addition to the information regarding the specific burdened and unburdened labor rates of each employee performing under the prior task order, BAH sought--and obtained--information regarding the agency’s undisclosed IGCE.

Finally, Serco asserts that all of the information discussed above, specifically including cost/price information, formed the basis for BAH’s approach to drafting and pricing its proposal in a manner that led the agency to conclude that BAH’s “significantly lower” cost/price and technical superiority offered the best value to the agency. Supp. Protest and Comments, Oct. 7, 2021, at 1-34; see AR, Tab 12, Best Value Determination at 12; COS/MOL, Sept. 27, 2021, at 1. On the record presented, Serco maintains that BAH, along with current and/or recently-retired agency personnel, compromised the integrity of the procurement by obtaining or providing non-public, competitively useful information, thereby giving BAH an unfair competitive advantage. Accordingly, pursuant to the FAR requirements regarding conflicts of interest, Serco maintains that the agency’s selection of BAH’s proposal for award was materially flawed.

³⁰ Jones states that he “supported the LCMG effort during my time in the Navy.” *Id.* at 3.

³¹ As noted above, Jones’s comments: referenced “Serco’s performance as the incumbent on the SEA-21 contract,” AR, Tab 20, encl. 16, Jones Declaration at 4; criticized specific aspects of Serco’s past performance; and asserted that “[s]trong win-themes here will do well for us.” AR, Tab 20, encl. 15, attach. Q, BAH Draft Proposal at 3.

The agency responds that, following Serco's February 2021 protest, the contracting officer conducted an investigation and concluded "there is not an actual or apparent conflict of interest and no current or former government employees' actions compromised the integrity of the procurement process." AR, Tab 20, Memo of Investigation at 4. More specifically, with regard to Jones's and Smith's access to the detailed information in Serco's monthly reports, including employees' burdened and unburdened labor rates, names, positions, and number of hours worked, the agency asserts that this information was "not competitively useful" because the solicitation provided recommended levels of labor hours, by labor categories, along with the minimum and desired qualifications of proposed personnel, and BAH's proposed labor rates reflected "existing employee salaries or public wage data." COS/MOL, Sept. 27, 2021, at 18, 21.

In asserting that Jones's and Smith's access to Serco's detailed performance information did not provide a competitive advantage, the agency also relies on Jones's and Smith's assertions that they: "delegated" many of their program manager responsibilities to their respective deputies; "did not recall" information regarding Serco's prior performance; and did not take documents with them upon leaving government service. *Id.* at 21. Similarly, in concluding there was no unfair competitive advantage, the agency relied on Jones's and/or Smith's assertions that, in preparing BAH's proposal, they: did not discuss information regarding Serco; did not "directly participate" in recruiting for BAH; and did not provide cost/price information to BAH during their proposal preparation efforts. Accordingly, the agency asserts that "neither Mr. Jones's nor Mr. Smith's access to Serco's cost information . . . created an unfair competitive advantage, because the information . . . was not competitively useful."³² COS/MOL, Sept. 27, 2021, at 21.

Similarly, the agency asserts that Jones and Smith's access to information regarding Serco's past performance and technical approach to performing the various task order requirements was not competitively useful and, therefore, did not provide an unfair competitive advantage.³³ *Id.* at 13-18. In reaching this conclusion, the agency, again, relied on Jones's and/or Smith's assertions that: they "recalled very little regarding Serco's contract or performance"; they delegated much of their responsibilities to their respective deputies; and Serco's performance was "never" discussed during weekly meetings. *Id.*

³² The agency also asserts that the information to which Jones and Smith had access was "stale" because, the formal solicitation and final SOW was not issued until July 2019. COS/MOL, Sept. 27, 2021 at 21.

³³ The agency also asserts that, because Serco received CPARS ratings of "Exceptional," Jones's criticisms of Serco's prior performance were his "personal opinions" and, therefore, "not . . . competitively useful." *Id.* at 7-18.

Finally, with regard to disclosure of IGCE information, the agency asserts that, following Serco's protest, agency personnel "reverse engineered" the disclosed information by selecting various factors that it asserts were publicly available. On the basis of those calculations, the agency maintains that the disclosed information could have been calculated by BAH and, therefore, should be considered public information. *Id.* at 22-24. Accordingly, the agency maintains that the COR's communications with BAH regarding the agency's undisclosed estimate of the task order value did not constitute disclosure of non-public, competitively useful information. *Id.*

In summary, based in large part on the representations of Jones and Smith regarding the scope of their prior activities, and their representations regarding the scope of their inputs to BAH's proposal, the agency maintains there was "no actual or apparent conflict of interest compromising the integrity of the procurement system." COS/MOL, Sept. 27, 2019 at 1.

As noted above, FAR subparts 9.5 and 3.1 prohibit conflicts of interest in the government's procurements, directing agencies to "avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships."³⁴ FAR 3.101-1; see *VSE Corp.*, B-404833.4, Nov. 21, 2011 CPD ¶ 268 at 7. In this context, where it can be demonstrated that a former government official had access to competitively useful information, the awardee will be found to have benefited from that information if the former government official participated in the proposal preparation effort. See, e.g., *Dell Servs. Fed. Gov't, Inc.*, B-414461.3 et al., June 19, 2018, 2018 CPD ¶ 213 at 6-7; *International Resources Grp.*, B-409346.2 et al., Dec. 11, 2014, 2014 CPD ¶ 369 at 9-10. That is, where an offeror chooses to hire a former government official who has had recent access to competitively useful information, and uses that official to help prepare the offeror's proposal, the proposal may be properly disqualified based on the appearance of an unfair competitive advantage. *Health Net Fed. Servs., LLC*, *supra*; see *NKF Eng'g, Inc. v. U.S.*, 805 F.2d 372 (Fed. Cir. 1986). In this context, we will review the reasonableness of an agency's determination with regard to an unfair competitive advantage. *VSE Corp.*, *supra*; *PCCP Constructors, JV; Bechtel Infrastructure Corp.*, B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 17. Our assessment of reasonableness will consider the particular facts presented by each situation, including the credibility of the information on which the agency relied. *International Resources Grp.*, *supra*.

³⁴ As our Office has recognized, the standard for evaluating whether a firm has an unfair competitive advantage under FAR subpart 3.1 stemming from its hiring of a former government employee is virtually indistinguishable from the standard for evaluating whether a firm has an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest under FAR subpart 9.5. *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28 n.15.

Here, based on the record discussed above, and summarized below, we conclude that the agency did not have a reasonable basis for determining that the information to which Jones and Smith had access, and/or the information that was provided to BAH by agency personnel, did not constitute non-public competitively useful information. Accordingly, we reject the agency's assertion that it reasonably concluded that BAH did not obtain an unfair competitive advantage in preparing its proposal.

First, as discussed above, the record establishes that BAH began its proposal preparation efforts no later than February 2018, and these efforts included hiring or meeting with multiple Navy personnel who played significant roles in BAH's proposal preparation and/or the Navy's subsequent source selection decision.³⁵ Next, the record is clear that Jones and Smith, 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. See AR, Tab 20, Memo of Investigation at 24-25, 32; Tab 20, encl. 28, Interview of COR at 1-2. We reject the agency's various assertions that the information to which Jones and Smith had access, specifically including Serco's labor rates and the IGCE information, did not constitute non-public, competitively useful information.³⁶

Next, 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.³⁷ There can similarly be

³⁵ As noted above, BAH's capture manager states that, “[i]n February 2018, [he] developed a comprehensive office call plan to enhance [BAH’s] capture efforts” and, further, that these meeting resulted in BAH obtaining information “about the incumbent contractor’s performance.” AR, Tab 20, encl. 15, attach. A, Declaration of BAH Capture Manager at 2-3.

³⁶ As discussed above, the agency's own COR for the SEA 21 task order specifically acknowledged that the detailed performance information in Serco's monthly reports, including labor rates and hours worked for each employee, “would [be] useful to a competitor.” AR, Tab 20, encl. 28, Interview of COR at 1. Further, an undisclosed IGCE constitutes information of “unquestionable competitive value,” *Guardian Techs. Int'l*, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 7, and the agency's selection of particular factors to apply in its post-protest “reverse engineering” exercise did not convert that calculation into public information.

³⁷ With regard to Smith, there is compelling evidence that he engaged in discussions with BAH's subcontractor several months before his employment with the Navy ended. Specifically, in an email dated March 13, 2018, Smith stated that he “expect[ed]” BAH's subcontractor to participate in the recompetition, and that he (Smith) “may be asked to be part of the planning for that teaming effort.” AR, Tab 20, encl. 33, attach. 2, Smith Emails. With regard to Jones, the record shows he began “part-time” employment with BAH's subcontractor during his period of terminal leave, and became a full-time employee the day after his formal retirement.

no dispute that Jones and Smith engaged in comprehensive proposal preparation activities on behalf of BAH; further, 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.³⁸

The record further establishes that, in selecting BAH's proposal for award, the agency viewed BAH's lower cost/price (reflecting BAH's lower proposed labor rates), along with its evaluated strengths for, among other things, "data analytics" and "manpower, personnel, and training," as discriminators in the award decision. See AR, Tab 10, TET Report at 8; Tab 12, Best Value Determination at 12.

Finally, in concluding that there was "no evidence" that BAH obtained access to non-public, competitively useful information and, therefore, did not gain an unfair competitive advantage, the agency relied heavily on Jones's and Smith's assertions regarding the limited nature of their prior activities, as well as their representations regarding the limited scope of their inputs to BAH's proposal. However, the declarations of both individuals are inconsistent with documents provided in the record. For example, in his declaration, Jones asserts that he "did not see information about Serco's labor rates" and "did not review resumes for or approve Serco personnel." AR, Tab 20, encl. 16, Jones Declaration at 2. However, the record contains a November 2, 2017 email from the Navy COR to Jones, requesting that Jones concur with Serco's proposal to hire a specific individual at a specified labor rate. Protest, exh. 13, Emails Regarding Hiring Decision. Similarly, Smith asserts that he "had very limited knowledge regarding Serco's staffing, rates, or costs." AR, Tab 20, encl. 16, Smith Declaration at 2. Yet, the record contains an email from Smith in which he acknowledges that, as a program manager, he "would review the total cost of [proposals to hire contractor personnel] and provide feedback to the Contracting Officer's Representative prior to accepting them." AR, Tab 20, encl. 33, attach. 2, Smith Emails.

³⁸ With regard to preparing BAH's proposal, Jones: described the "activities of and issues faced by the program offices," AR, Tab 20, encl. 16, Jones Declaration at 2; provided a "tutorial on PMS 443's work," *id.*; "shar[ed] information about Navy operations and requirements," *id.* at 2-3; responded to BAH's request to "identify issues that would be important to SEA 21 leadership," *id.* at 3; "participated in Hepburn's recruitment efforts," *id.*; participated on BAH's "silver team," "pink team," and "red team," *id.* at 3-5; provided "technical inputs," *id.* at 4; provided specific criticisms of "Serco's performance as the incumbent," *id.*; and "draft[ed] a paragraph to tie [BAH's] data analytics and AI [artificial intelligence] capabilities to SEA 21 initiatives." *Id.* at 5. Similarly Smith's proposal preparation efforts included: "providing [his] thoughts on SEA 21 important issues," AR, Tab 20, encl. 16, Smith Declaration at 2; "provid[ing] input for . . . Silver Team slides pertaining to . . . manpower-related tasking requirements," *id.*; discussing "staffing requirements," *id.* at 3; and "confirming the availability of bid Key Personnel." *Id.* at 4.

By way of another example, Jones asserted that he was not involved in “oversight of Serco” and “recall[ed] very little regarding Serco’s contract or performance.” AR, Tab 20, encl. 16, Jones Declaration at 1-2. Yet, in providing input for BAH’s proposal, Jones specifically described Serco’s prior performance as “not providing consistent delivery”; asserted that “vacant positions are an issue”; and represented that Serco “doesn’t do cyber well.”³⁹ AR, Tab 20, encl. 15, Notes of July 10 Meeting at 1-2. Similarly, while allegedly having limited knowledge regarding Serco’s performance of the prior task order’s requirements, Jones was nonetheless able to provide specific examples of how BAH’s proposal could be “more responsive” to those requirements. AR, Tab 20, encl. 16, Jones Declaration at 3-5.

As noted above, where an offeror chooses to hire former government officials who have had recent access to competitively useful information, and uses those officials to assist in proposal preparation efforts, our Office will assume that the offeror benefited from the information; further, under such circumstances, disqualification is appropriate based on the appearance of an unfair competitive advantage alone. In reviewing an agency’s determination regarding an unfair competitive advantage, our Office will consider the particular facts presented by each situation, along with the credibility of the information on which the agency relied.

Here, for the reasons discussed above, we reject the agency’s assertion that it reasonably found no evidence of an unfair competitive advantage flowing from BAH’s various actions in pursuing the task order award, including the use, through its subcontractors, of the former program managers to assist in BAH’s proposal preparation efforts. Based on the information discussed above, that conclusion is not reasonably supported by the record. Rather, the record before our Office shows that BAH had access to information that was not public and was competitively useful. As a result, we conclude that BAH obtained an unfair competitive advantage in preparing its successful proposal; accordingly, we sustain the protest.

RECOMMENDATION

As discussed above, an agency may properly disqualify a proposal based on an offeror’s unfair competitive advantage. Accordingly, we recommend that the agency either disqualify BAH’s proposal or, alternatively, initiate actions to avoid, neutralize, or mitigate the potential impact of the disclosed IGCE information and the information to which the former Navy employees had access, and seek revised proposals. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including reasonably attorneys’ fees. 4 C.F.R. § 21.8(d)(1). The protester’s

³⁹ BAH’s capture manager “thought that this presented a good opportunity for [BAH] in light of the Navy’s increased cyber activity that Jones had been describing,” AR, Tab 20, encl. 15, attach. A, Declaration of BAH Capture Manager at 3, and, as noted above, the agency assigned a strength to BAH’s proposal with regard to “data analytics.”

certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel