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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: CACI, Inc.-Federal

File: B-403064.2

Date: January 28, 2011

Richard J. Webber, Esq., and Patrick R. Quigley, Esq., Arent Fox LLP, for the protester.

Rand L. Allen, Esq., Nicole J. Owren-Wiest, Esq., Brian G. Walsh, Esq., and Tracye Winfrey Howard, Esq., Wiley Rein LLP, for Booz Allen Hamilton, the intervenor. Heather J. LoPresti, Esq., Department of Defense, Defense Human Resources Activity, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee should not have been permitted to receive the award of a contract for certain services because the awardee—through its performance of a task order for the agency—was given access to information that the protester now claims as proprietary and was exposed to certain agency information that gave the awardee an unfair competitive advantage, is denied, where the agency reasonably concluded that the protester had furnished its information voluntarily without restrictions on its use, and that the record did not support the protester’s contention that the awardee had an unfair competitive advantage by virtue of its task order work.

DECISION

CACI, Inc.-Federal, of Fairfax, Virginia, protests the award of a contract to Booz Allen Hamilton (BAH), of McLean, Virginia, under request for proposals (RFP) No. H98210-10-R-0005, issued by the Department of Defense, Defense Human Resources Activity (DHRA), for services in support of the Defense Personnel Records Information Retrieval System (DPRIS). CACI argues that the agency failed to properly consider organizational conflicts of interest (OCI) pertaining to BAH, and that the agency’s past performance evaluation was inconsistent with the terms of the solicitation.

We deny the protest.

BACKGROUND

The DPRIS is a secure, web-based system that allows for access to “vital military personnel information.” RFP at 10. The RFP sought proposals for essentially the same DPRIS support services that have been provided by CACI for the past 15 years under different contract vehicles, most recently under a task order issued by the General Services Administration (GSA) to CACI in 2005. Contracting Officer’s Statement at 5; AR, Tab 56, DPRIS Technical Evaluation Board Chairperson and Former DPRIS Project Manager (TEBC/DPRIS PM) OCI Memorandum (Sept. 28, 2010), at 2.

The RFP, issued February 18, 2010, provided for the award of a fixed-price contract for a base period of 1 year with four 1-year option periods. The solicitation stated that the contract would be awarded to the offeror submitting the proposal representing the best value to the government considering the evaluation factors of past performance, technical, and price. Offerors were informed that the results of the evaluation under the past performance factor would be considered more important than the technical factor, and that the results under the past performance and technical factors combined would be considered significantly more important than price. RFP at 51. The solicitation further provided that proposals would be evaluated under the past performance factor as either “satisfactory,” “unsatisfactory,” or “neutral,” and under the technical factor as either “exceptional,” “acceptable,” or “unacceptable.” RFP at 52.

The agency received proposals from only CACI and BAH in response to the solicitation. The agency evaluated the proposals, included both proposals in the competitive range, conducted discussions, and requested, received, and evaluated final revised proposals. CACI’s proposal was evaluated as “satisfactory” under the past performance factor, and “excellent” under the technical factor, at a total evaluated price of \$12,513,573. BAH’s proposal was evaluated as “satisfactory” under the past performance factor, and “acceptable” under the technical factor, at a total evaluated price of \$9,755,603. The agency ultimately selected BAH’s proposal for award, finding that any advantages associated with CACI’s proposal did not offset its considerable disadvantage with regard to price. Contracting Officer’s Statement (B-403064) at 6, 8.

CACI filed its first protest with our Office on June 11, 2010, arguing that the agency had failed to perform a proper best-value determination and that BAH was precluded from receiving award due to certain OCIs. Specifically, CACI pointed out that BAH serves as a support contractor to DHRA’s Program Management Office under a task order issued in August 2009, and asserted that, in BAH’s performance of its DHRA task order, BAH had gained “a unique awareness of DHRA attitudes, concerns, and future plans with regard to DPRIS.” Protest (B-403064) at 2. The protester further argued that in BAH’s performance of its DHRA task order, BAH personnel had attended meetings at which CACI and agency personnel had been present, and that

at these meetings the BAH personnel had been exposed to certain CACI proprietary information regarding CACI's performance as the incumbent DPRIS support contractor. The protester states that it "always cooperated openly and fully in its dealings with BAH when it came to sharing operational, functional and technical information," and that it did so "believing that it would not find itself competing against BAH for DPRIS work." Protester's Comments (B-403064) at 16; exh. 2, Declaration of CACI DPRIS Program Manager, at 9. CACI concluded that this "unequal access to information" gave BAH an unfair advantage in competing for the contract at issue here.¹ Protest (B-403064) at 8-9. The protester further argued that the award to BAH created an "impaired objectivity" OCI because BAH, in its role as the DHRA support contractor, would have to evaluate its own performance as the DPRIS contractor.² Id. at 10-11.

The agency subsequently took corrective action in response to CACI's protest, stating that it would address the issues raised by CACI concerning the propriety of the agency's source selection determination, and would again evaluate whether BAH's participation in the competition, and the award to BAH, resulted in impermissible OCIs.³ Our Office dismissed CACI's protest as academic on August 3, 2010.

The record reflects that, in reevaluating the OCI issues, the contracting officer reviewed the agency's prior OCI analysis, the work performed by BAH under its DHRA task order, particularly as it relates to DPRIS, and the work performed by

¹ An unequal access to information OCI as addressed in the Federal Acquisition Regulation (FAR) and the decisions of our Office consists of a situation where a firm has access to non-public information as part of its performance of a government contract and that information provides a competitive advantage in a later competition. FAR § 9.505-4; CIGNA Gov't Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 10.

² An impaired objectivity OCI consists of a situation where a firm's work under one government contract could entail its evaluating itself, such as through an assessment of performance under another contract. FAR § 9.505-4; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254297.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13.

³ With regard to the above reference to the agency "again" evaluating the OCI issues, the record reflects that prior to issuing the solicitation, the agency believed that BAH, in addition to CACI, may want to compete for the award here. The agency thus considered whether any OCIs existed that would preclude BAH from the competition, and had concluded, after some analysis, that no such OCIs existed. Contracting Officer's Statement at 8; AR, Tab 56, TEBC/DPRIS PM OCI Memorandum, at 4-6.

CACI as the incumbent contractor under its DPRIS task order. Contracting Officer's Statement at 10. Additionally, the contracting officer conferred with, among others, DHRA's Procurement Support Office, including the source selection authority (SSA) here, and DHRA's Office of General Counsel. The contracting officer also conferred with certain technical advisors, including the cognizant Technical Evaluation Board Chairperson, who had also served as the DPRIS Program Manager. AR, Tab 9, Contracting Officer's OCI Memorandum (Oct. 18, 2010).

The contracting officer also contacted CACI and BAH, and requested that they provide certain detailed information to assist the agency in its OCI analysis. Specifically, by letter dated August 13, 2010, the contracting officer informed CACI that "DHRA is making a thorough inquiry into the question of whether [BAH] had unequal access to information that gave it an unfair competitive advantage in proposing to . . . [the RFP here] for DPRIS support." This letter continued by acknowledging that, in performing its DHRA support contract, "BAH [personnel had] attended meetings where CACI shared information with the Government and BAH" regarding the DPRIS. The letter requested that "each of the CACI employees who participated in or had knowledge of the aforementioned meetings" provide a statement that included explanations of their role under the CACI DPRIS task order; their participation in meetings where BAH employees were also participants; and whether "they provided any information to BAH that was proprietary to CACI." If information was provided to BAH employees that was considered proprietary, the CACI employees were asked to explain why it was considered proprietary, and to provide copies of any written information, or specific descriptions of any information provided orally. The letter also specifically requested that the CACI employees providing statements include "[c]opies of any documents originated by CACI or detailing CACI performance" under the CACI DPRIS task order that were "stamped proprietary, commercial confidential, trade secret protected, etc.," and were provided to "a BAH employee and the name of that employee." Finally, the letter requested that the CACI employees state "whether they are aware of any Government or BAH employee informing CACI that BAH would not compete for DPRIS support" under the RFP here. AR, Tab 13, Contracting Officer Letter to CACI (Aug. 13, 2010), at 1-2.

The contracting officer sent a similar letter to BAH, which differed primarily with regard to the information the requested statements were to include. In this regard, the letter to BAH specifically identified 12 BAH employees that had participated in the aforementioned DPRIS meetings where CACI had shared information with the Government and BAH personnel. The letter requested that each of the identified BAH employees provide a statement that included explanations of their role under the BAH DHRA task order, their participation in meetings where CACI was also a participant, whether "they received any information from CACI that was proprietary to CACI," and if so, copies of any written information or specific descriptions of any information that had been provided orally. The letter also specifically requested that "[i]f they did not receive any information that was proprietary, they should so state."

The letter further requested that the BAH employees providing statements include “[c]opies of any documents originated by CACI or detailing CACI performance” under the CACI DPRIS task order that were “stamped proprietary, commercial confidential, trade secret protected, etc.,” and that if no such documents were received, that they were to state as such. The letter added that the BAH employees’ statements were to include “[a]n explanation of whether they had access to CACI proprietary information through means other than meetings, either by virtue of their office location” within the agency or by “some other means.” BAH employees were also requested to state “whether they are aware of any BAH employee informing CACI that BAH would not compete for DPRIS support” under the RFP here, and to provide a copy of the “Contractor or Subcontractor Employee Non-Disclosure Agreement they executed as a BAH employee” in connection with the BAH DHRA task order. Finally, the BAH employees were requested to provide explanations of their role in preparing BAH’s proposal in response to the RFP here. AR, Tab 36, Contracting Officer’s Letter to BAH (Aug. 13, 2010), at 1-3.

The CACI and BAH employees provided the statements and documentation as requested. The statements and accompanying documentation, as well as other information gathered by the agency regarding the alleged OCI issues, were reviewed in the first instance by the TEBC/DPRIS PM, who prepared a detailed 20-page memorandum setting forth his analysis of the OCI issues that had been raised. AR, Tab 56, TEBC/DPRIS PM OCI Memorandum.

The TEBC/DPRIS PM began his analysis by reviewing the work performed by BAH and CACI under their respective task orders. In this regard, the TEBC/DPRIS PM noted, among other things, that under its task order BAH provides “a wide variety of support” to the agency, including a number of activities related to human resources management. The TEBC/DPRIS PM explained that less than 3 percent of the work performed by BAH under its task order involved CACI’s work under its DPRIS task order. The TEBC/DPRIS PM added with regard to this small percentage of work that “BAH is not involved in any way with oversight of or the performance of [CACI’s] task order, and had no input into how the work was or should be performed.” Id. at 4.

The TEBC/DPRIS PM continued by describing the steps that the agency had taken prior to the issuance of the solicitation in analyzing and concluding that neither BAH’s participation in the competition nor an award to BAH would result in impermissible OCIs. Specifically, the TEBC/DPRIS PM found inaccurate CACI’s general assertion that through the performance of its DHRA task order BAH had gained a “unique awareness of DHRA attitudes, concerns, and future plans with regard to DPRIS.” In this regard, the TEBC/DPRIS PM concluded that only the agency, and not BAH, had any “unique awareness” of the agency’s attitudes, concerns, or plans, and that any information the agency “has decided to share regarding future DPRIS plans has been shared with CACI and made public” through a variety of outlets. Id. at 11.

The TEBC/DPRIS PM also found that, during the course of the competition here, there had been no “improper disclosures or access to source selection information.” In this regard, the TEBC/DPRIS PM stated that all source selection information regarding the RFP here had been “tightly controlled” by appropriate agency personnel, and that no contractors had been given access to that information. Id. at 8.

The TEBC/DPRIS PM analyzed the assertion made in CACI’s June 2010 protest that BAH should have been excluded from the competition because the company had been provided access to CACI proprietary information during DPRIS meetings. In doing so, the TEBC/DPRIS PM first noted that “the DPRIS code was developed entirely with Government funds,” and that the government had unlimited data rights to DPRIS software and software documentation. The TEBC/DPRIS PM noted that, “[a]s such, CACI was contractually required to provide such information regarding DPRIS, and the Government was permitted to disclose it to third parties, including other contractors, as required.” The TEBC/DPRIS PM further noted that under CACI’s DPRIS task order CACI was required to conduct monthly in-process review meetings, attended by CACI and government personnel only, where CACI provided a monthly status on the progress of the task order, as well as a monthly performance and progress report (MPPR). These meetings included the presentation of certain cost summaries, current problem areas, and work accomplished by task. The MPPRs included “the corrective actions to be taken to correct any variances;” explanations of the risk associated with certain actions; and identification, estimation, and explanation of “any costs incurred but not billed.” In addition to noting that these meetings had been attended by only CACI and government personnel, the TEBC/DPRIS PM noted that the MPPRs and information contained therein had been shared with government personnel only, and “kept under lock and key.” Id. at 9-10.

The TEBC/DPRIS PM next explained that, contrary to CACI’s assertion, no CACI cost or price information, progress reports, or award fee self-assessments had ever been made available to BAH, but rather, had only been disclosed to certain government employees “with a need to know.” The TEBC/DPRIS PM added here that BAH could not have “stumble[d] upon” any of the above-described information, given that such information is also kept “locked in a filing cabinet” or stored in an electronic format accessible by only the TEBC/DPRIS PM. Id. at 10.

With regard to the meetings described by CACI in its initial protest to our Office, where CACI, agency, and BAH personnel were present, the TEBC/DPRIS PM, who had attended the meetings as the DPRIS PM, stated that to his knowledge no “Government official improperly disclosed CACI proprietary or non-public information.” The TEBC/DPRIS PM added that he and another agency employee who had attended the meetings “reviewed a year’s worth of weekly review meeting minutes,” and “could not find any information in those minutes that qualified as CACI commercial confidential, non-public, or proprietary information.” Id. at 11-12.

The TEBC/DPRIS PM also reviewed the statements and documents submitted by the CACI employees in response to the agency's August 13, 2010 request. The TEBC/DPRIS PM found that although CACI's lead software systems engineer for DPRIS identified in and attached to her statement two documents that were deliverables under CACI's DPRIS task order (the DPRIS Configuration Management Plan and the DPRIS Program Management Plan), which she stated included CACI "non-public" or "proprietary" information, these documents had not, contrary to CACI's apparent belief, been provided to BAH. AR, Tab 15, Declaration of CACI's Lead Software Engineer for DPRIS, at 2; Tab 17, DPRIS Configuration Management Plan; Tab 18, DPRIS Program Management Plan; Tab 56, TEBC/DPRIS PM OCI Memorandum, at 13-14.

With regard to the statement submitted by CACI's DPRIS Program Manager, the TEBC/DPRIS PM found that while the CACI Program Manager's statement included a copy of a document entitled "DPRIS System Environment--Status, Challenges and Recommendations," which, as asserted by CACI's Program Manager, included "CACI non-public information regarding [CACI's] technical approach to performing the work," and which was shared with BAH, that document had not included any markings designating it as proprietary or confidential, nor did it include any markings identifying it as a CACI document. AR, Tab 19, Declaration of CACI's Program Manager, at 2-3; Tab 24, DPRIS System Environment--Status, Challenges and Recommendations; Tab 56, TEBC/DPRIS PM OCI Memorandum, at 15.

CACI's Project Manager/Functional Specialist (PM/FS) for DPRIS also submitted a declaration detailing the information CACI disclosed orally and in writing during meetings at which BAH personnel were present, and why in the CACI PM/FS's view, that information was confidential or proprietary to CACI. AR, Tab 25, Declaration of CACI's PM/FS, at 2-5. In reviewing the PM/FS's submission, the TEBC/DPRIS PM determined that "[i]t is far from clear that some of the information CACI refers to as non-public or proprietary actually qualifies as such," and again noted, with regard to the alleged proprietary information that was orally disclosed, that he and another agency employee had "reviewed a year's worth of weekly review meeting minutes," and "could not find any information in those minutes that qualified as CACI commercial, non-public, or proprietary information." Tab 56, TEBC/DPRIS PM OCI Memorandum, at 11-12, 17. With regard to the copies of the written information provided by CACI at those meetings, the TEBC/DPRIS PM, while questioning whether the information qualifies as proprietary to CACI, again noted that none of the information was marked as proprietary or confidential. Id.

The TEBC/DPRIS PM also reviewed the statements provided by the BAH personnel, and found that these statements were consistent with his and other agency personnel's recollections of the meetings where CACI, government, and BAH personnel had been in attendance. That is, that the BAH personnel had not received or otherwise been given access to any documents that had been designated, either in writing or orally, as proprietary to CACI. Further, the statements of the BAH

personnel also confirmed the TEBC/DPRIS PM's belief that BAH had not received or been privy to any information provided by CACI that would provide BAH with an unfair competitive advantage. Tab 56, TEBC/DPRIS PM OCI Memorandum, at 18. The TEBC/DPRIS PM concluded, based upon all of the information available, that BAH had not improperly been provided with or obtained CACI proprietary information. The TEBC/DPRIS PM found that there was no evidence that any CACI proprietary information had been disclosed to BAH by agency personnel. The TEBC/DPRIS PM added that contrary to CACI's assertion in its June 2010 protest, neither the agency nor BAH had expressly stated or implied that BAH would not compete for DPRIS support, including the RFP at issue here. The TEBC/DPRIS PM added that disclosures of information during the referenced meetings had been made "by CACI itself," and concluded that "it was incumbent upon CACI, to control its own information, and CACI cannot now claim information as non-public or proprietary that it freely disclosed to BAH during performance of the contract." Tab 56, TEBC/DPRIS PM OCI Memorandum, at 19.

The contracting officer reviewed the findings of the TEBC/DPRIS PM, as well as all other information available regarding the alleged OCIs, and concluded, consistent with the views of the TEBC/DPRIS PM, that "no [OCI] exists that would preclude [BAH] from the competition for the DPRIS support services requirement" under the RFP. AR, Tab 9, Contracting Officer's OCI Memorandum, at 7. These findings were reviewed by the SSA, with the SSA again finding that BAH's proposal represented the best value to the government and again selecting BAH for award of the contract. After requesting and receiving a debriefing, CACI filed this second protest.

DISCUSSION

Alleged OCIs

CACI again protests that BAH's role as DHRA support contractor created an "unequal access to information" OCI that cannot be mitigated, and as such, BAH should have been excluded from the competition. CACI also again argues that because of BAH's performance as a support contractor to DHRA's Program Management Office, BAH has "a unique knowledge of the government's plans, attitudes and preferences for future DPRIS development." Protest at 13. In support of this assertion, the protester points, without explanation, to the previously discussed statements provided by the CACI employees to the agency in response to the agency's August 13 request. The protester also points to BAH's technical proposal in support of its assertion that BAH's participation in the competition created an unequal access to information OCI, noting, for example, that BAH's proposal states that BAH has a "unique understanding" of the agency's "needs and strategic vision." *Id.*; see AR, Tab 62, BAH Technical Proposal, at 1-1. The protester also again argues that BAH, in its performance of the DHRA task order, attended meetings at which CACI and agency personnel had been present, and that these

meetings exposed BAH personnel to certain CACI proprietary information regarding CACI's performance as the incumbent DPRIS support contractor.⁴

The responsibility for determining whether a conflict exists rests with the procuring agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., *supra*, at 12. In making this determination, the FAR expressly directs contracting officers to examine the particular facts associated with each situation, giving consideration to the nature of the contracts involved, and further directs contracting officers to obtain the advice of counsel and appropriate technical specialists before exercising their own sound discretion in determining whether an OCI exists. FAR §§ 9.504, 9.505. In reviewing bid protests that challenge an agency's conflict determinations, the Court of Appeals for the Federal Circuit has mandated application of the "arbitrary and capricious" standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt, Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). In Axiom, the Court of Appeals noted that "the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion." *Id.* The standard of review employed by this Office in reviewing a contracting officer's OCI determination mirrors the standard required by Axiom. In this regard, where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. CIGNA Gov't Servs., LLC, B-401068.4; B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12.

As indicated by the discussion above, the record reflects that the agency performed a comprehensive OCI analysis. The TEBC/DPRIS PM and contracting officer, as well as individuals associated with DHRA's Office of the General Counsel and Procurement Support Office, all participated in the OCI analysis, and clearly gave "meaningful consideration to whether an OCI exists" with regard to BAH's performance as the DHRA support contractor. The protester's assertion that BAH's DHRA task order gave BAH an unfair competitive advantage because BAH gained a "unique understanding" of the agency's plans and needs was expressly addressed by the agency during its OCI analysis, and found to be without merit. As explained above, the agency states that certain information regarding its plans for DPRIS had been released publicly, and that it failed to understand, based upon its analysis and CACI's generalized assertions, why BAH could be considered to have any such "unique awareness." In this regard, the agency also noted that to the extent BAH had an advantage in this competition because of its performance of the DHRA task order,

⁴ CACI no longer argues that the award to BAH creates an "impaired objectivity" OCI. In this regard, as part of its review of CACI's first protest and corrective action, the agency amended BAH's DHRA task order, and in doing so, resolved the protester's concerns that an award to BAH would create such an "impaired objectivity" OCI. Protester's Comments at 2.

CACI enjoys a similar or greater advantage because of its 15 years of performance as the DPRIS support contractor under its task order.

Based on our review of the record, we cannot conclude that this aspect of the agency's OCI determination was unreasonable or reflected an abuse of discretion. We agree with the agency that, with the exception of the generalized statements in BAH's technical proposal, CACI has failed to point to any specific agency information BAH may have learned during its performance of the DHRA task order that provided BAH with an unfair advantage in competing for this award. Moreover, and in regard to BAH's alleged "unique awareness" of the agency's needs or plans, it is well settled that an offeror, such as BAH (or CACI), may possess unique information, advantages and capabilities due to its prior experience under a government contract—either as an incumbent contractor or otherwise; further, the government is not necessarily required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action. MASAI Techs. Corp., B-298880.3, B-298880.4, Sept. 10, 2007, 2007 CPD ¶ 179 at 8. The existence of an advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally occurring advantage necessarily unfair. Id. With regard to the language in BAH's technical proposal, which is the only specific evidence the protester contends supports its assertion here, we cannot find that such statements, which amount to "puffery," are sufficient to establish that BAH had an unfair competitive advantage, particularly given the agency's other findings to the contrary. See Imperial Schrade Corp., B-223527.2, Mar. 6, 1987, 87-1 CPD ¶ 254 at 12 (statements made by retired Army officer that only he knew the agency's needs were mere puffery and insufficient to disqualify firm from the competition). Under the circumstances here, the protester's contentions amount to no more than bare speculation that BAH had unequal access to competitively useful information, and as such provides no basis to find that BAH had a conflict of interest. See Mechanical Equip. Co., Inc., et al., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192 at 29.

We also do not find unreasonable the agency's determination that BAH, in its performance of its DHRA task order, was not improperly exposed to CACI proprietary or confidential information. We first note that certain of the information CACI asserts or suggests was improperly disclosed was either information that in fact was not disclosed to BAH, such as the information referred to in the statement of the CACI engineer, or was information to which the agency had "unlimited data rights," and thus was "permitted to disclose" to third parties. See AR, Tab 56, TEBC/DPRIS PM OCI Memorandum, at 9, 13. With regard to the other information referenced by CACI, and provided to the agency as attachments, we find reasonable the agency's position that "it was incumbent upon CACI, to control its own information and CACI cannot now claim information as non-public or proprietary that it freely disclosed to BAH during performance of the contract." Id. at 19. In this regard, our Office has stated that, as a general rule, proprietary information is that which is so marked or otherwise submitted in confidence to the government. Snell

Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 6; Interior Sys., Inc., B-271469, July 23, 1996, 96-2 CPD ¶ 34 at 2. In this regard, FAR § 9.505-4(a) specifically provides:

When a contactor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—

- (1) Furnished voluntarily without limitations in its use; or
- (2) Available to the Government or contractor from other sources without restriction.

Here, the record reflects that the information now claimed by CACI as proprietary was “furnished voluntarily without limitations on its use.” That is, the record reflects that the information was not marked as proprietary, nor was it submitted in confidence to the government or BAH. Specifically, CACI has not pointed to any information that was marked or otherwise identified as proprietary or confidential in either its statements furnished to the agency in August 2010, or its submissions to our Office during this protest. Moreover, we have no reason to disagree with the agency’s conclusion that none of CACI’s proprietary or non-public information was ever disclosed to BAH by agency personnel. Nor does the record reasonably show that CACI was somehow misled by BAH or government personnel into believing that BAH would not compete for future DPRIS work, or that the information being freely shared would be treated as proprietary or confidential.

In sum, we find reasonable the agency’s determination that BAH did not have OCIs that precluded award under this RFP.⁵

⁵ CACI argues that the BAH personnel, by attending the meetings at which CACI and agency personnel were present and then assisting in the preparation of BAH’s proposal, violated the non-disclosure agreements they signed in connection with the BAH DHRA task order. Protester’s Comments at 3. However, CACI has not explained what provisions of the non-disclosure agreements were violated, or why this provides a cognizable basis of protest, particularly given our conclusion that the agency was reasonable in finding that BAH did not have OCIs that would preclude an award under the RFP.

Past Performance Evaluation

CACI also protests that the agency did not perform a qualitative analysis of the offerors' past performance, and instead improperly "relegated" the past performance evaluation to an "acceptable/not acceptable determination." Protest at 23. The protester contends that "DHRA created difficulties for itself by prescribing in the solicitation only three possible ratings for Past Performance: Satisfactory, Neutral, or Unacceptable," which the protester characterizes as "[e]ssentially . . . a pass/fail system." Protester's Comments at 19. The protester concludes that because of this, "the agency failed to perform a meaningful qualitative analysis with regard to the Past Performance factor." *Id.* at 21.

As pointed out by the protester, the agency found both CACI's and BAH's past performance to be satisfactory, in accordance with the terms of the solicitation, which contemplated that past performance would only be rated either satisfactory, unsatisfactory or neutral. To the extent that the protester now contends that the solicitation should have provided for the consideration of past performance in a different manner, such as through the use of a more qualitative evaluation scheme providing for a range of ratings, its protest is untimely. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2010); *Spectrum Sys., Inc.*, B-401130, May 13, 2009, 2009 CPD ¶ 110 at 4 (a protest alleging improprieties in a solicitation that are apparent prior to the time set for receipt of initial proposals shall be filed before that time).

The protest is denied.

Lynn H. Gibson
General Counsel