



Comptroller General  
of the United States

Washington, D.C. 20548

Benejam

147662

## Decision

**Matter of:** General Electric Government Services, Inc.

**File:** B-245797.3

**Date:** September 23, 1992

James J. Cook, Esq., General Electric Government Services, Inc., for the protester.  
Anthony J.D. Contri, Esq., Civerolo, Hansen & Wolf, P.A., for The Proteus Corporation, an interested party.  
Jeffrey I. Kessler, Esq., and Robert F. Colvin, Esq., Department of the Army, for the agency.  
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Allegation that awardee's employment of former agency employees constitutes a conflict of interest which rendered the firm ineligible for award is denied where the record does not show that any action by the former agency employees conferred an unfair competitive advantage on the awardee.
2. Contention that awardee's proposal was unreasonably evaluated because the awardee, who proposed to hire incumbent employees, did not demonstrate a history of successful transition of functions from an incumbent's contract to a successor contract is denied since offerors were not required to demonstrate a history of successful transitions; awardee submitted an acceptable phase-in plan as required by the solicitation.
3. Contention that contracting agency improperly applied evaluation preference for small disadvantaged businesses (SDB) by failing to use factors listed in a Federal Acquisition Regulation (FAR) provision (referenced in solicitation's SDB preference clause) in evaluating awardee's proposal is denied since the referenced FAR provision was merely a guide for the contracting agency to use in identifying qualified potential competitors.

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## DECISION

General Electric Government Services, Inc. (GEGS), the incumbent, protests the award of a contract to The Proteus Corporation under request for proposals (RFP) No. DAAD07-91-R-0003, issued by the Department of the Army for the operation and maintenance (O&M) of target control systems at the White Sands Missile Range in New Mexico. The contract is to provide a continuation of O&M services currently provided by the protester under a contract the Army awarded GEGS in 1986.<sup>1</sup> GEGS alleges that (1) Proteus gained an unfair competitive advantage by hiring former Army employees; (2) the Army unreasonably evaluated Proteus's proposal on the assumption that the awardee could successfully take over the contract; and (3) in evaluating the awardee's proposal, the Army improperly applied a 10 percent preference factor for small disadvantage businesses (SDB).

We deny the protest.

## BACKGROUND

The RFP was issued on an unrestricted basis on December 10, 1990, and contemplated the award of a cost-plus-fixed-fee, level-of-effort contract, for 5 years. The RFP required the successful contractor to provide all labor, management, materials, and other resources required to perform the contract as specified in Purchase Description 0012D-90, "The Operation and Maintenance Services of the Target Control System," incorporated in full as an attachment to the RFP. That 29-page document set forth in detail all of the O&M services required under the contract including procedures, scheduling, and operations, as well as a detailed description of existing system capabilities. Sections C.3 and L.13.4 of the RFP listed the government's best estimate of direct labor personnel required to accomplish the anticipated tasks, and was considered the minimum mandatory levels for technical support. The RFP also set forth minimum

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<sup>1</sup>The record shows that the Army initially awarded the contract to the RCA Service Company, then a division of the RCA Corporation, Government Services. On June 9, 1986, the General Electric Company acquired the RCA Corporation and its subsidiaries. Effective December 31, 1987, the General Electric Company, the RCA Corporation, and the government executed a novation whereby the parties agreed, among other things, that the protester would assume all of RCA's existing obligations to the government, including performance of the O&M contract. For clarity and continuity, we refer to only GEGS as the incumbent.

qualifications and educational experience for each of seven key labor categories.<sup>2</sup>

Offerors were required to submit technical and cost proposals in four separate volumes: (1) technical, (2) management, (3) quality assurance, and (4) cost. Section M of the RFP stated that the technical area was more important than the management area, and that those two areas would be considered more important than the quality assurance area. The RFP stated that an evaluation board would assign numerical scores to proposals in accordance with the evaluation factors and subfactors listed in the RFP and that proposed costs would be evaluated for realism. Section M of the RFP, as amended, further stated that overall technical merit would be considered significantly more important than cost, and that cost would be more important than performance risk. The RFP also provided for the addition of a 10 percent preference factor to the costs proposed by non-SDB concerns. The RFP indicated that as technical merit scores approached being equal, cost would become more significant in the selection process. Award was to be made to that offeror whose proposal represented the best value to the government.

Seven firms, including GEGS, responded to the RFP by the January 24, 1991, extended closing date. A proposal evaluation board (PEB) evaluated initial technical proposals by assigning numerical scores on each of the evaluation factors and subfactors listed in the RFP. Each offeror's proposed costs were separately evaluated by a price analyst who recommended adjustments to certain costs for realism based on the Army's independent cost estimate for this procurement.

Based upon the results of the initial evaluation, the contracting officer eliminated two offerors from further consideration and included the remaining five proposals, including the protester's and the awardee's, within the competitive range. The Army then conducted discussions and requested best and final offers (BAFO) from these five offerors. The PEB reevaluated and rescored technical

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<sup>2</sup>The labor categories and number of positions required for each were: site manager, 1; electronics engineer, 1; computer engineer, 1; electronics technician, 7; computer specialist or analyst, 2; computer programmer, 3; and computer operator, 1. The RFP also called for 1 administrative assistant, for a total of 17 persons.

proposals. Final overall technical scores out of 1,000 possible points were as follows:

<u>Offeror</u>	<u>Technical Score</u>
GEGS (non-SDB)	983.5
Proteus (SDB)	965.5
C (non-SDB)	940.0
D (non-SDB)	893.5
E (non-SDB)	778.5

In its discussion of the revised proposals submitted by GEGS and Proteus, the PEB stated that both firms responded to the RFP's requirements in "outstanding fashion," and that both firms were fully capable of providing "more than satisfactory [O&M] services." Although offeror C's proposal was acceptable, the PEB considered that proposal to present medium risk to the government. The PEB concluded that award to either GEGS or Proteus would present the lowest technical and cost-related risks to the government.

Based on those results, the contracting officer considered only GEGS, Proteus, and offeror C's proposals further. The contracting officer made cost realism adjustments to both Proteus's and offeror C's proposed costs, making no adjustments to GEGS' proposed costs.<sup>3</sup> Since Proteus represented in its proposal that it is an SDB concern, the contracting officer also added a 10 percent factor to GEGS' and offeror C's evaluated cost, resulting in the following evaluated costs, including all cost realism adjustments: GEGS--\$4,682,410; Proteus--\$4,348,039; and offeror C--\$4,593,580. Based upon its evaluated costs, technical merit score, and low risk to the government, the contracting officer determined that Proteus's proposal represented the best value to the government, and awarded the contract to that firm on September 13, 1991.<sup>4</sup>

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<sup>3</sup>Proteus's cost proposal was adjusted upward to reflect overtime, New Mexico's applicable gross receipts tax, and estimated phase-in costs. Offeror C's proposed costs were also adjusted upward to reflect estimated phase-in costs.

<sup>4</sup>The Army issued a stop work order to Proteus pending resolution of GEGS' protest.

## PROCEDURAL HISTORY

GEGS initially protested the award to our Office on October 4, 1991, alleging, among other things, that Proteus violated certain provisions of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423 (1988 and Supp. II 1990), as implemented by Federal Acquisition Regulation (FAR) § 3.104-7.<sup>5</sup> In this regard, GEGS primarily maintained that a current Proteus employee, Mr. Kenneth P. Lindsley, is a retired Army employee who participated personally and substantially in preparing the RFP, and had intimate knowledge of proprietary information GEGS submitted to the Army under its current O&M contract.

The agency referred the issue GEGS raised concerning possible OFPP Act violations to the Army Criminal Investigation Command (ACIC) for investigation. On December 20, we dismissed GEGS' protest pending the outcome of the ACIC's investigation and the Army's action based on those results.

The ACIC investigation focused on GEGS' principal allegation that prior to Mr. Lindsley's retirement, he helped prepare the technical data package in connection with the current RFP. Interviews with several Army officials who were involved in preparing the RFP revealed that the requiring activity where Mr. Lindsley worked submitted the RFP's technical requirements package to the contracting office nearly a year after Mr. Lindsley retired from the Army, and that Mr. Lindsley did not participate in preparing that package prior to his retirement.

The ACIC investigator also interviewed Mr. Carl E. Shoemaker, GEGS' project manager for the O&M contract. Mr. Shoemaker stated that in or about October 1989, prior to his retirement as the contracting officer's representative (COR), Mr. Lindsley requested his advice pertaining to manning levels on the then upcoming O&M solicitation. Mr. Shoemaker also submitted an affidavit to our Office stating that as COR, Mr. Lindsley had indicated that he was being pressured to submit the technical requirements package to the contracting office for the new RFP. Although

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<sup>5</sup>As relevant to GEGS' protest, FAR § 3.104-7(b) prohibits a former government employee who was a procurement official with respect to a particular procurement, from knowingly participating in any manner in negotiations as an employee or representative of a competing contractor leading to the award or a modification of a contract for the same procurement.

Mr. Shoemaker stated during the ACIC investigation that he had no direct knowledge that Mr. Lindsley personally participated in the preparation of the technical requirements package, based on his conversations he believed that Mr. Lindsley participated in preparing the RFP prior to his retirement as COR. Based upon the results of these interviews, the ACIC investigation concluded that there was insufficient evidence to find that Mr. Lindsley had committed any criminal offense.

Subsequent to the ACIC investigation, the contracting officer made a separate finding pursuant to FAR § 3.104-11 that none of the actions GEGS complained of regarding possible violations of the OFPP Act had any impact on the selection process, concluding that the Army properly made award to Proteus. After the Army announced its decision to not disturb the awarded contract, GEGS and Rome Research Corporation, another offeror which had also protested the award to our Office, reinstated their protests. The issues raised by Rome Research and GEGS are considered in separate decisions.

#### PROTESTER'S CONTENTIONS

The protester primarily maintains that Proteus gained an unfair competitive advantage by hiring Mr. Lindsley, a retired Army official who was the COR for GEGS' current O&M contract until his retirement in December 1989. The protester alleges that prior to retiring from his position as COR, Mr. Lindsley participated personally and substantially in preparing the RFP, and had intimate knowledge of GEGS' proprietary technical and business information concerning the O&M contract. The protester makes similar allegations concerning Mr. Santiago Abalos, a former administrative contracting officer for GEGS' O&M contract from 1987 to 1988, who is now a Proteus employee. GEGS also contends that in evaluating the awardee's proposal, the Army improperly assumed that Proteus could successfully take over contract functions, and objects that the contracting officer erred in applying the 10 percent evaluation preference for SDBs in evaluating proposals.

#### DISCUSSION

##### Timeliness

As a preliminary matter, the Army argues that GEGS' protest regarding Mr. Lindsley is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1992). According to the agency, the protester knew, based upon a meeting attended by

the protester and Proteus on December 18, 1990, that Proteus had employed Mr. Lindsley and that he had contributed to Proteus's business development efforts, but did not protest until October 4, 1991.<sup>6</sup> GEGS states, however, that it did not learn of the basis for its protest concerning Mr. Lindsley until September 23, 1991, after the award had been announced, when Mr. Lindsley stated during a telephone conversation with Mr. Shoemaker that he had worked on the awardee's proposal.

While Mr. Lindsley's participation during the December 18, 1990, meeting may have indicated his involvement in the business development efforts of Proteus, there is no support for the agency's contention that GEGS should have known from that meeting that Mr. Lindsley would later assist Proteus to prepare its proposal in response to this RFP. The protester states that the purpose of that meeting was to discuss a teaming arrangement between Proteus and GEGS; that Mr. Lindsley's role was only to introduce Mr. Shoemaker to Proteus; and that GEGS understood that since Mr. Lindsley had been the COR on the O&M contract, he would remain at "arm's length from the procurement." There is no basis for us to question GEGS' statement in this regard.

Since this is a negotiated procurement, GEGS had no way of knowing which firms actually submitted proposals, or which proposals the Army was considering, until it received notice of the September 13, 1991, award to Proteus. Further, the record shows that GEGS did not actually learn of the basis for its protest concerning Mr. Lindsley's involvement in the procurement until September 23. Thus, the protest filed on October 4 is timely.

#### Unfair Competitive Advantage

GEGS argues that since Mr. Lindsley served as the COR on GEGS's current O&M contract, and helped prepare the awardee's proposal after his retirement, Mr. Lindsley

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<sup>6</sup>According to an affidavit submitted by Mr. Roy Martinez, Chief Executive Officer of Proteus, Mr. Martinez, and Mr. Lindsley met with Mr. Carl E. Shoemaker, a GEGS employee, to inquire about Mr. Shoemaker's future availability. According to Mr. Martinez's affidavit, the parties also discussed the possibility of GEGS considering Proteus as its "SDB team member" on the O&M contract.



violated the post-employment conflict of interest restrictions applicable to procurement officials. See FAR S 3,104-3(d). GEGS maintains that since Mr. Lindsley had access to source selection sensitive documents, GEGS' labor rates on the current O&M contract, the protester's fixed fee, overhead structure, and other information GEGS considers proprietary, Proteus should be eliminated from the competition.

The Army argues that since Mr. Lindsley retired from his position as COR several months before the RFP was issued, and had no involvement with the current procurement while an Army employee, he should not be considered a "procurement official" subject to the post-employment restrictions in connection with this procurement. With respect to Mr. Abalos, the agency similarly argues that since he was the administrative contracting officer for O&M contract only during September 1987 through September 1988, more than 2 years before the RFP was issued, and since he did not participate in any phase of this procurement before he later left government service, no post-employment restrictions apply to him.

As a matter of policy, the agency further argues that to prohibit government employees who may have had access to information provided to the government by a contractor from being subsequently employed by a firm which may compete on a future successor contract, without a showing of wrongdoing or that an unfair competitive advantage was conferred on a

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That section provides in part:

"(1) No individual who . . . was a procurement official with respect to a particular procurement may knowingly--

"(i) Participate in any manner, as an . . . employee . . . or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement; or

"(ii) Participate personally and substantially on behalf of the competing contractor in the performance of such contract."

"[These restrictions] apply during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement."



competitor, would constitute an unreasonable expansion of the current limited restrictions contemplated by the FAR. According to the Army, such an expansive reading of the FAR would unfairly forbid the future employment of retirees and other former government officials by any firm except an incumbent. The agency argues that such an interpretation of the conflict of interest and post-employment regulations would accord a new and substantial competitive advantage on incumbents, while unduly expanding the scope of the post-employment restrictions to an extent beyond that contemplated by the current statutory and regulatory scheme.

A hearing was held in connection with this protest limited to considering whether, and to what extent, during his tenure as COR, Mr. Lindsley had access to any information considered proprietary to GEGS, which may have conferred an unfair competitive advantage on Proteus in this procurement. During the hearing and throughout this proceeding, GEGS introduced evidence that, as required under its O&M contract, the firm periodically submitted to the Army various documents which contained information GEGS considered proprietary, including: (1) monthly performance cost reports; (2) GEGS' response to work assignment orders (WAO); (3) monthly operations reports; and (4) invoices. Mr. Shoemaker, GEGS' project manager, testified that these documents were regularly submitted either to the contracting officer with copies to various Army officials, including the COR, or directly to the COR.<sup>8</sup> GEGS also introduced into the record the designation letter setting forth the COR's various duties and responsibilities under GEGS' O&M contract.<sup>9</sup> According to GEGS, the COR's official functions

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<sup>8</sup>These documents were provided to counsel for Proteus under a protective order issued by our Office under 4 C.F.R. § 21.3(d)(1). Due to the nature of the information they contain, these documents will be discussed in general terms only.

<sup>9</sup>The designation letter instructs the COR to "review progress reports, cost, reports, invoices/vouchers. . . ." The letter also states that:

"Based on the COR's review of the contractor's cost and performance reports, paid vouchers and other pertinent data, provide comments concerning the reasonableness and appropriateness of the contractor's costs to date, reasons for overrun/underrun, and impact on future funding requirements. In the case of level-of-effort type contracts, particular care must be taken to track the actual level of effort expended versus the

(continued...)

convey full access to GEGS' cost, technical, and performance data, information which GEGS considers proprietary, and could be used by a competitor to its advantage in any competition against GEGS.

The performance cost reports include actual level-of-effort, labor hours, skill mix, overhead, general and administrative (G&A) rate, and GEGS' fixed fee on its O&M contract.<sup>10</sup> The WAOs required GEGS to prepare a cost estimate for certain tasks, which also included direct labor rates and overhead. The monthly operations report details GEGS' efforts each month, and specifies how labor was allocated for specific tasks. The invoices also contain information such as actual cost of performance, overhead, and G&A, which GEGS considers proprietary. In summary, GEGS contends that as contracting officials on the O&M contract, Mr. Lindsley and Mr. Abalos had access to these and other documents contained in the contract file. The protester specifically argues that Mr. Lindsley would not have been able to successfully perform his duties as COR without frequent reference to these documents, and that having this information would unfairly enable a competitor to enhance its proposal.

An agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the procurement system so long as the determination is based on facts, and not mere innuendo or suspicion. Our review is to determine whether the agency has a reasonable basis for its decision to allow an offeror to compete in the face of an allegation of an apparent conflict of interest. Holmes & Narver, Inc., B-239469.2; B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210. A contracting agency may not disqualify a firm from the competition for an appearance of impropriety or apparent conflict of interest where the agency has conducted an internal investigation that established that no wrongdoing actually occurred. See FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366, citing NES Gov't Servs., Inc. et al., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291. The mere employment of a former government employee who is familiar with

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<sup>9</sup>(...continued)

contractual level of effort and to forecast the impact which accelerated expenditures may have on the contract term."

<sup>10</sup>The page of this report containing the actual figures is marked "GE Company Proprietary," and contains the legend "[t]he information contained herein is proprietary to [GEGS] and may not be used, copied, duplicated, or disclosed in whole or in part outside the government without prior written consent of [GEGS]."

the type of work required but not privy to the contents of proposals or to other inside agency information does not confer an unfair competitive advantage. Regional Envtl. Consultants, 66 Comp. Gen. 67 (1986), 86-2 CPD ¶ 476, aff'd, 66 Comp. Gen. 388 (1987), 87-1 CPD ¶ 428. Here, we find that the employment of the former government employees by the awardee did not confer an unfair competitive advantage on Proteus.

The protester has not shown and the record does not suggest that either Mr. Lindsley or Mr. Abalos participated as both a government employee and as a representative for, or on behalf of, Proteus with respect to the same procurement, which is the kind of situation to which the OFPP Act applies. See, e.g., MDT Corp., B-236903, Jan. 22, 1990, 90-1 CPD ¶ 81. With respect to Mr. Lindsley, the results of the ACIC investigation show that the requiring activity, where Mr. Lindsley worked, did not submit its completed technical requirements package to the contracting office until nearly 1 year after Mr. Lindsley's retirement. While Mr. Shoemaker testified at the hearing that Mr. Lindsley requested his advice concerning certain manning levels, and that in his opinion, the recommended levels were later incorporated into the RFP, there is no reason to conclude that such peripheral involvement should be considered a "personal and substantial" participation by Mr. Lindsley in the development of the technical data package. See FAR § 3.104-4(g) (defining "participated personally and substantially").

Further, the record shows that Mr. Abalos served as the administrative contracting officer for the O&M contract during the period September 1987 through September 1988, more than 2 years before the RFP was issued. He later resigned from a different Army position in May 1990. There is no evidence in the record that Mr. Abalos participated in any phase of the preparation of the instant RFP prior to his resignation, or that he was privy to any inside agency information concerning this procurement.

The RFP's statement of work set forth all of the requirements for direct staffing and manning levels for each labor category, the functions of each position, and the required minimum educational qualifications and experience for each. In addition, attachment No. 1 to the RFP (a 29-page purchase description) specifically explained in narrative format each of the tasks required under the contract. Thus, even if in the course of his duties as COR Mr. Lindsley requested GEGS' opinion regarding manning levels, we cannot say that such information was "inside" information, since it was later disclosed in detail in the RFP to all offerors. We therefore fail to see how any information Mr. Lindsley may have

gained from his conversation with Mr. Shoemaker provided any advantage to Proteus in this procurement.

With respect to the protester's allegation that, as procurement officials on the O&M contract, Mr. Lindsley and Mr. Abalos had access to proprietary information GEGS submitted to the government, there is no dispute that Mr. Lindsley had access to most of the monthly reports and various other documents GEGS submitted to the Army under its O&M contract. The record also shows that Mr. Abalos was the administrative contracting officer on the O&M contract from September 1987 to September 1988, and that he also may have had access to all of the information GEGS submitted to the Army during that period. The parties disagree, however, as to whether the information contained in the documents GEGS submitted to the government should be viewed as "proprietary" to GEGS so as to render improper the award to Proteus. For instance, the Army and the interested party argue that in considering those documents, we should apply the definition of "proprietary information" found in FAR § 3.104-4(j)(1).<sup>11</sup> On the other hand, the protester argues that we should refer to other statutory definitions of "proprietary information," as found in the OFPP Act, and the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1988).

We need not decide whether the information contained in the monthly reports and other documents GEGS submitted to the Army under its O&M contract are "proprietary" under any of the various definitions urged by the parties.<sup>12</sup> Rather, the issue presented here is whether by virtue of their official duties, Mr. Lindsley's and Mr. Abalos's access to

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<sup>11</sup>That section defines proprietary information as:

"[I]nformation contained in a bid or proposal or otherwise submitted to the government by a competing contractor in response to the conduct of a particular federal agency procurement, or in an unsolicited proposal, that has been marked by the competing contractor as proprietary information in accordance with applicable law and regulation."

<sup>12</sup>In any case, each of the performance cost reports in the record contains the restrictive legend "GE Company Proprietary," and a notation that the information contained therein is not to be copied or disclosed outside the government without GEGS' consent. The WAOs also contain a similar legend restricting the use of that information. It is therefore clear that with respect to those documents clearly marked "proprietary," GEGS provided that information to the Army with the expectation that, at a minimum, they would not be made public without GEGS' approval.

that information, without more, conferred an unfair competitive advantage on Proteus in this procurement. As explained more fully below, we find that Proteus gained no unfair competitive advantage in this procurement from hiring Mr. Lindsley and Mr. Abalos.

Mr. Lindsley testified during the hearing that when he retired from the Army in December 1989, his second retirement following a military career, he had no plans for future or continued employment. His first contact with Proteus was in June 1990, 6 months after he left government service. At that time, Proteus contacted Mr. Lindsley regarding a position with the firm as a manager for a project unrelated to the O&M contract. He began to work for Proteus in that position on August 1, 1990, several months before the instant RFP was issued.

Mr. Lindsley also testified that his educational background is in mechanical and aeronautical engineering, rather than accounting. He stated that as COR, he reviewed only a limited amount of the information GEGS provided, such as labor hours, work accomplished, and only a few areas related to costs. Mr. Lindsley stated that although the contracting officer and other officials used the cost-related information in GEGS' monthly reports in their analyses, he did not review or analyze overhead figures or G&A. He further testified that he compared GEGS' voucher amounts to actual amounts, and that he tracked costs GEGS billed to the government, with a view towards ascertaining the adequacy and availability of funds.

Mr. Lindsley further testified that although he participated in the preparation of Proteus's technical and phase-in proposal, he did not assist in the preparation of Proteus's cost proposal, and that no one at Proteus requested any cost or business information related to GEGS. Mr. Lindsley testified that he never shared any of GEGS' information with Proteus, or worked or commented on Proteus's cost proposal. We have no basis to question Mr. Lindsley's testimony. During the hearing, GEGS's project manager, who was responsible for preparing the various reports the protester submitted to the Army under the O&M contract, indicated that he could not recall from memory specific information from those reports, such as G&A or overhead, for a particular performance period, without at least referencing those documents to refresh his memory.

On this record we think that without referencing the actual documents GEGS submitted to the Army in connection with its O&M contract, and without performing myriad calculations with that information, it would be virtually impossible for even someone familiar with those documents to accurately reproduce GEGS' overhead, G&A, pricing structure, or labor

mix on the O&M contract. GEGS does not allege, and the ACIC criminal investigation revealed no evidence suggesting, that Mr. Lindsley removed any of the referenced documents when he left government service. Nevertheless, even assuming that Mr. Lindsley and Mr. Abalos were somehow capable of the formidable task of remembering significant portions of the information GEGS submitted to the Army long after leaving their respective positions related to the O&M contract, the protester has not shown how such information affected this competition.

In addition to the remote possibility that Mr. Lindsley and Mr. Abalos could accurately recall any information from the documents they reviewed while Army employees, the record shows that more than 2 years passed between the time Mr. Abalos left his position as administrative contracting officer on the O&M contract and when the Army issued the RFP; nearly 1 year passed between the time that Mr. Lindsley retired from the Army and his subsequent participation on Proteus's proposal. The record further shows that neither individual had access to any inside agency information unavailable to other offerors pertaining to this procurement.

Based on our review of the extensive submissions of the parties, including the testimony elicited at the hearing in this proceeding, we conclude that any involvement Mr. Lindsley and Mr. Abalos had with GEGS' O&M contract while government employees is so attenuated by the passage of time, and so diluted by the remote possibility of anyone accurately reconstructing GEGS's pricing structure, labor mix, G&A, overhead or other information pertaining to GEGS's O&M contract, that it is doubtful that such data could be competitively useful in this procurement. See Person-Sys. Integration, Ltd., B-243927.4, June 30, 1992, 92-1 CPD ¶ 546. Accordingly, we find that no action by either Mr. Abalos or Mr. Lindsley conferred an unfair competitive advantage on Proteus in this competition. See Dayton T. Brown, Inc., 68 Comp. Gen. 6 (1988), 88-2 CPD ¶ 314, aff'd, B-231579.2, Nov. 29, 1988, 88-2 CPD ¶ 525.<sup>13</sup>

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<sup>13</sup>Compare Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379, cited by the protester, where we found that the awardee gained an unfair competitive advantage warranting corrective action where a former government official who had access to restricted information concerning a procurement helped prepare the awardee's proposal for that procurement.



## Evaluation of Proteus's Proposal

The protester argues that the Army unreasonably evaluated the awardee's proposal under the assumption that Proteus would be successful in hiring and retaining most of the incumbent's work force, and taking over the contract functions. The protester argues that the Army should not have considered sufficient the resumes and letters of intent the awardee submitted with its proposal, without requiring Proteus to show that the firm has successfully completed this type of transition before.

The RFP required offerors to provide personnel with certain minimum education and experience qualifications, and to submit resumes of all professional and management personnel directly associated with accomplishing the requirements. Contrary to the protester's suggestion, offerors were not required to demonstrate a history of successful transitions of functions from a predecessor to a successor contract. Instead, offerors were required to submit a transition plan that provided for (1) a complete and orderly phase-in; (2) a timetable for the orderly assumption of responsibilities; (3) adequate resources; (4) adequate back-up for satisfactory performance of all functions; and (5) plans covering key functional areas during the phase-in period.

Proteus submitted a phase-in plan reflecting its intention to fill the required positions using the incumbent's personnel. The Army evaluated Proteus's phase-in plan and considered it acceptable; the protester has not shown that this judgment is unreasonable. The fact that another firm was successful in recruiting and hiring only one incumbent employee to work under a different, successor, contract (for architect and engineering services), or that the majority of the work force declined employment with another successor contractor on a "radar contract," as the protester argues, does not affect our conclusion here. Accordingly, we have no reason to conclude that Proteus's personnel are not adequately qualified or that the awardee's phase-in plan is unacceptable.

## SDB Evaluation Preference

The RFP contained in full Department of Defense FAR Supplement (DFARS) § 252.219-7007 (DAC 88-11), the "Notice of Evaluation Preference for [SDB] Concerns," which provides that, except in circumstances not applicable here, after all other evaluation factors are applied, proposals will be further evaluated by adding a factor of 10 percent to offers received from other than SDB concerns.



DFARS § 219.7000 (DAC 88-14) set forth the Department of Defense policy with respect to the award of contracts to small businesses and SDB concerns at the time the Army issued the RFP. That provision stated in relevant part that:

"(a) . . . offers from SDB concerns shall be given an evaluation preference in accordance with the procedures of [DFARS part 219]. The evaluation preference shall only be used in competitive acquisitions (except as provided in (b) below) where award is based on price and price related factors

"(b) . . . the evaluation preference may also be used in other competitive acquisitions at the discretion of the source selection authority, when (1) SDBs are expected to possess the requisite qualifications, consistent with the demands of the acquisition (e.g., see [Federal Acquisition Regulation (FAR) §] 35.007 with regard to technical qualification of sources) . . . ." (Emphasis added, parenthetical in original.)

According to the protester, the contracting officer improperly applied the 10 percent preference factor in evaluating proposals because the Army, in evaluating Proteus's proposal, improperly failed to evaluate Proteus's experience and other technical qualifications, as required by FAR § 35.007, referenced in DFARS § 219.7000(b).<sup>14</sup>

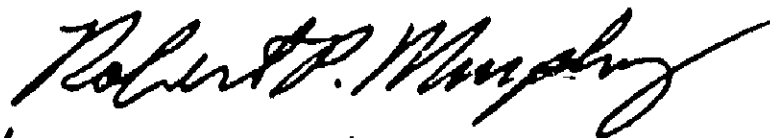
We find no merit to this argument. Although agencies are not required to use the evaluation preference where, as here, award is based primarily on technical merit rather than price, Signal Corp., B-245376, Sept. 10, 1991, 91-2 CPD ¶ 238, under the quoted DFARS provision applicable to this procurement, the preference could be used at the discretion of the source selection authority when "SDBs are expected to

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<sup>14</sup>GECS also argues that since the cited regulation provides for application of the SDB preference factor only where award is to be based on "price and price-related factors," and price was not the basis for award here, the Army should not have used the evaluation preference. Since the RFP clearly stated that the technical areas were more important than cost in the selection process, and set forth DFARS § 252.219-7007 in full, the protester's allegation that the Army should not have applied the preference factor in this procurement is untimely and will not be considered. See 4 C.F.R. § 21.2(a)(1).

possess the requisite qualifications." DFARS § 219.7000(b). The reference in the DFARS to FAR § 35.007 simply provided the agency with guidance for determining if there were qualified SDB sources. (FAR § 35.007, dealing with research and development contracts, advises contracting officers to distribute initial solicitations to only those sources that appear technically qualified to perform the specific tasks involved after consideration of various qualification factors such as present and past performance and professional reputation.) Nothing in the DFARS or in the FAR required that the proposals, once received, be evaluated against the criteria listed in FAR § 35.007.

The protest is denied.

  
for James F. Hinchman  
General Counsel