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# Decision

**Matter of:** CACI, Inc.- Federal

**File:** B-421224; B-421224.2; B-421224.3

**Date:** January 23, 2023

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Robert K. Tompkins, Esq., Gregory R. Hallmark, Esq., Jeremy D. Burkhart, Esq., and Richard Ariel, Esq., Holland & Knight, LLP, for the protester. Jonathan A. Hardage, Esq., and Amanda Westrich, Esq., Department of the Army, for the agency. Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Where the documented record supports the agency’s reasonable determination that the protester’s use of a former government employee’s assistance in the protester’s pursuit of a contract created an actual or apparent unfair competitive advantage, our Office will not substitute our judgment for that of the agency.
  2. Agency’s determinations regarding an actual or apparent unfair competitive advantage were not unduly delayed; did not deprive the protester of due process; and were not based on, or affected by, consideration of which companies would, or would not, subsequently submit proposals.
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## DECISION

CACI, Inc.-Federal, of Reston, Virginia, protests the Department of the Army’s decision to exclude CACI from competing under request for proposals (RFP) No. W15P7T-23-R-0001 for award of the sixth generation of an Army information technology (IT) hardware contract; the contract is generally referred to as the Common Hardware Systems (CHS) contract, or CHS-6. The Army’s decision was based on its determination that CACI’s use of a former government employee’s assistance in CACI’s pursuit of the CHS-6 contract created, “at a minimum, an appearance of an unfair competitive advantage.” Agency Report (AR), Tab 7, Notification of Final Decision at 1.<sup>1</sup> CACI protests that the

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<sup>1</sup> Page number citations in this decision refer to the Adobe PDF page numbers in the documents submitted.

decision is “inherently unreasonable,” “not supported by evidence,” and “in violation of applicable law.” Protest at 2.

We deny the protest.

## BACKGROUND

The contract at issue is the sixth generation of CHS contracts under which the Department of Defense and other federal agencies are able to purchase tactical IT hardware such as servers, laptops, networking devices, ruggedized platforms, hand-held devices, operational transit cases and peripheral devices, along with warranties and support services.<sup>2</sup> Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 2; Agency Report (AR) Tab 10A, PWS at 6. The predecessor CHS contract (referred to as CHS-5) was awarded to General Dynamics Mission Systems (GDMS) in August 2018 and includes prices that are effective through August 2023, when the contract is scheduled to expire. GDMS, or a predecessor company, has held the CHS contracts since 1995.

The former government employee who is relevant to this protest (referred to here as X) was the source selection advisory council (SSAC) chairperson for the CHS-5 procurement, and was one of the Army representatives involved in negotiating with GDMS prior to the award of the CHS-5 contract.<sup>3</sup> AR, Tab 3H, Responses from X to Contracting Officer’s Questions at 3. As the SSAC chairperson, X concurred on, and signed a document titled “Memorandum for [X], Source Selection Advisory Council Chair” that summarized several matters addressed during the CHS-5 negotiations, including: GDMS’s identification of “cost drivers in the requirements that could be managed or mitigated to minimize cost impact to the customers”; GDMS’s initially proposed rates for certain items; and various negotiated modifications to the solicitation requirements. AR, Tab 3Z, SSAC Brief at 3-8.

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<sup>2</sup> The Army anticipates award of a single indefinite-delivery, indefinite-quantity contract with an ordering period of up to 10 years and an estimated value of \$7.9 billion. AR, Tab 10A, Performance Work Statement (PWS) at 7; Tab 8, Acquisition Plan at 9-10. The contract will permit government customers to purchase items from a catalog, or add products through a process called technology insertion, and will provide options for configuration management, which allows customers to order the same configuration of a previously ordered item. AR, Tab 10A, PWS at 31-33; Tab 8 Acquisition Plan at 26.

<sup>3</sup> Although the CHS-5 procurement was solicited under procedures for full and open competition, GDMS was the only offeror to submit a proposal, which led to negotiations between GDMS and the Army prior to contract award.

From January 6, 2016 to April 28, 2019, X also held the position of product lead (PdL) under the two predecessor contracts (CHS-4 and CHS-5).<sup>4</sup> AR, Tab 5E, Declaration of X at 2. Under the heading “Major Duties,” the Army’s position description for “Product Lead/Acquisition” includes the following: “[r]esponsible for all aspects of acquisition to include development, testing, system integration, production fielding, sustainment and product improvements” and “[b]alances cost, schedule and performance to assure best value for the Army.” AR, Tab 6AD, Position Description at 3.

From April 29, 2019, until he retired on November 11, 2019, X served as operations officer for the CHS Program Executive Office (PEO), Command, Control, Communications--Tactical (C3T).<sup>5</sup> Under the heading “Major Duties,” the Army’s position description for “Operations Officer” includes: “Oversees projects and programs, identifies and shapes the goals of the organizational unit” and “Leads special ad hoc management study teams concerned with identifying existing and needed changes in organizational structures, missions, functions, workload, resources, accessions, and transition planning.” AR, Tab 3AF, Position Description at 3. As discussed in more detail below, the Army states that, while serving as operations officer in 2019, X participated in an analysis of GDMS’s prices under the CHS-5 contract. COS/MOL at 5.

X retired from government service on November 11, 2019. On March 14, 2021, X began providing consulting services to CACI pursuant to an agreement with Defense Contractor Consulting Group, LLC (DCG).<sup>6, 7</sup> See AR, Tab 3G-1, Independent Contractor Agreement.<sup>8</sup> As discussed in more detail below, CACI described the

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<sup>4</sup> Prior to serving as PdL for the CHS-4 and CHS-5 contracts, X served as the deputy product director under the CHS-4 contract. AR, Tab 5E, Declaration of X at 2.

<sup>5</sup> The PEO C3T has “overall responsibility” for the CHS-6 contract. AR, Tab 6, Final Decision at 3.

<sup>6</sup> CACI states that it “has a Purchase Order with DCG pursuant to which DCG provides support to CACI’s Business Development and Capture activities.” AR, Tab 3G, CACI Response to Notice of Concern at 3.

<sup>7</sup> CACI notes that the Army released a request for information (RFI) regarding the CHS-6 procurement in early 2020, and states that CACI “made the decision to pursue the CHS-6 opportunity” in August 2020. See AR, Tab 5A, Declaration of CACI Capture Manager at 2. In August 2020, CACI “first contacted [X] about the prospect of providing consulting services in connection with CHS-6.” AR, Tab 3G, CACI Response to Notice of Concern at 3-4. In February 2021, CACI again contacted X, seeking his services; in March 2021, X began providing consulting services to CACI. *Id.*

<sup>8</sup> As part of his agreement with DCG, X represented that he would “comply with all applicable laws and regulations of the U.S. Government . . . including but not limited to matters of procurement integrity” and had “no conflicting obligations with the U.S.

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services that X provided as “reviewing, advising, or developing capture/proposal materials.” AR, Tab 3G, CACI Response to Notice of Concern.

In October 2021, the Army conducted “one-on-one” meetings with several industry companies that had expressed interest in the CHS-6 procurement, including CACI. COS/MOL at 3. The Army met with CACI on October 25, 2021; X was one of the CACI participants at that meeting. AR, Tab 3, Preliminary Decision at 7-9. On November 2, 2021, X attended a technical exposition at Aberdeen Proving Ground, Maryland and, at that event, told GDMS personnel that he was consulting for CACI in connection with the CHS-6 procurement. See AR, Tab 6B-1, Letter from GDMS Associate General Counsel; see *also* AR, Tab 6B, Email from GDMS Senior Director for Contracts.

By letter to the contracting officer dated December 8, 2021, GDMS referred to X’s apparent involvement in CACI’s pursuit of the CHS-6 contract; noted that X had access to GDMS proprietary information pursuant to his former position as CHS PdL; and requested that the contracting officer investigate the matter. *Id.*

Thereafter, the contracting officer initiated an investigation to determine whether CACI’s utilization of X created an unfair competitive advantage under Federal Acquisition Regulation (FAR) subpart 3.1. COS/MOL at 7-8. Over the next few months, the contracting officer consulted with Army counsel and technical experts, engaged in written communications and interviews with Army and GDMS personnel, and gathered documents. *Id.*

Between December 12, 2021, and December 23, 2021 (shortly after GDMS had requested an investigation), X engaged in email communications with Army ethics counselors under the subject line “Guidance for Contractor Employment.”<sup>9</sup> AR, Tab 3AG, Email String Between X and Army Ethics Counselors. In an initial email to

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Government based on prior service . . . that could present a conflict of interest.” AR, Tab 3G-1, Independent Contractor Agreement at 3-4.

<sup>9</sup> X states: “When I retired from government service, I sought but ultimately did not receive a Post Government Employment [PGE] out-processing briefing.” AR, Tab 5E, Declaration of X at 3. In the context of this representation, the contracting officer states that all requests for PGE opinions must be documented in the After Government Employment Advice Repository (AGEAR) system; yet, the AGEAR system does not reflect a 2019 request from X for a PGE opinion. COS/MOL at 19-21; AR, Tab 14A, Declaration of Contracting Officer at 2. The contracting officer further states that, in performing his investigation, he came to question the credibility of X based on apparent inconsistencies between X’s statements and the record; the inconsistency between X’s representation that he sought a PGE opinion in 2019, and the absence of such a request in the AGEAR system was one of these inconsistencies. AR, Tab 14A, Declaration of Contracting Officer at 1-2.

one of the ethics counselors, X stated: “I need your advice on working as a consultant for a company that supports a defense contractor.”<sup>10</sup> *Id.* at 6. After receiving a “comprehensive PGE guide,” *id.* at 4, and being advised that the ethics counselor would need additional information, X ended the communication, stating: “I will not be taking a position with CACI<sup>[11]</sup> or entertain any other opportunities with Defense contractors.”<sup>12</sup> *Id.* at 2.

On January 14, 2022, the agency issued a draft RFP for the CHS-6 procurement. AR, Tab 6AK-1, Draft RFP. On January 18, 2022, X discontinued providing consulting services for CACI and, on February 1, 2022, he “voluntarily departed from DCG.” AR, Tab 3G, CACI Response to Notice of Concern at 3; Tab 3H, Response of X to Contracting Officer Questions at 1.

By letter to CACI dated April 18, 2022, with the subject “Notice of Concern on Common Hardware Systems 6<sup>th</sup> Generation (CHS-6)” (hereinafter “Notice of Concern”), the contracting officer referenced X’s apparent involvement in CACI’s pursuit of the CHS-6 contract and stated: “I am charged with avoiding the appearance of impropriety in government procurements . . . [and] must determine whether CACI may have obtained an unfair competitive advantage if it hired a former government employee with knowledge of non-public information.” AR, Tab 3E, Notice of Concern. Accordingly, the contracting officer asked CACI to respond to various questions regarding the relationship between X and CACI, and to discuss the nature of any services X had provided.<sup>13</sup>

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<sup>10</sup> At that time, X was working under his agreement with DCG, supporting CACI’s pursuit of the CHS-6 contract, and had been doing so for approximately nine months; his email communications with the ethics counselors did not disclose that fact.

<sup>11</sup> X states that he had been considering accepting direct employment with CACI at the time of his communications with the ethics counselors. AR, Tab 5E, Declaration of X at 5-7.

<sup>12</sup> As noted above, at that time, X had already been working for DCG for approximately nine months; and in this capacity, X provided support to CACI’s business development efforts. The contracting officer states that X’s failure to “provide all the facts” to the ethics counselors formed another basis for questioning X’s credibility. AR, Tab 14A, Declaration of Contracting Officer at 1-2.

<sup>13</sup> On April 19, the contracting officer sent a similar letter to X, asking that he respond to various questions regarding his prior activities, including the following: “after working as the PdL CHS [from January 6, 2016 to April 28, 2019], did you work on any projects that required GDMS pricing information?” AR, Tab 3F, Contracting Officer’s Letter to X at 2. X responded on May 3, stating, among other things: “While I worked as an Operations Officer [from April 29, 2019 until retiring on November 11, 2019] . . . I did not work on any projects that required GDMS pricing information.” AR, Tab 3H, Responses of X to Contracting Officer Questions at 4. With regard to his activities after leaving

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On May 3, CACI responded to the contracting officer's Notice of Concern, acknowledging that, from March 2021 to January 18, 2022, X provided consulting services to CACI, through CACI's agreement with DCG, stating:

As a consultant, [X] was tasked to advise and support CACI's Business Development, Capture, and Proposal Teams in connection with the CHS-6 procurement. His responsibilities included reviewing, advising, or developing capture/proposal materials.

AR, Tab 3G, CACI Response to Notice of Concern at 3.

In response to the contracting officer's more specific request that CACI identify the topics on which X provided support, CACI stated:

[X] was tasked with building technical solutions for CACI's proposal for CHS-6.<sup>[14]</sup> His focus areas were Program and Data Management, Technical Assistance Support Services, and Quality Assurance. He also provided support regarding Delivery Order Processes, Technology Insertion, and Transition Solutioning.

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At times [X] would help clarify requirements identified in the CHS-6 RFI, draft PWS,<sup>[15]</sup> and other government provided materials as well as answer team questions regarding workflow, drawing upon his CHS-5 experience. This information focused on understanding contract processes and not GD [General Dynamics] specific performance.

*Id.* at 4-5.

Finally, CACI asserted that: "[X] did not work on cost or pricing for CACI's CHS-6 proposal"; "[X] would recuse himself from conversations where GDMS was specifically

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government employment, X stated that, due to his non-disclosure agreement with DCG, he was "preclude[d]" from answering some of the agency's questions. *Id.* at 4-5.

<sup>14</sup> Subsequently, a CACI representative also stated that X's role in assisting CACI "focused on," among other things, "whether the Government would find CACI's technical solutions to be valuable." AR, Tab 13A, Declaration of CACI's Executive Director of Strategic Pricing and Estimation at 2.

<sup>15</sup> A draft PWS for the CHS-6 contract had been released on August 21, 2021.

discussed”;<sup>16</sup> and “[t]o CACI’s knowledge, [X] provided CACI with no proprietary, non-public or competitively useful or sensitive information that would create an unfair competitive advantage.” *Id.* at 5. Although CACI referenced the provisions in X’s agreement with DCG in which X represented that he would “comply with all applicable laws and regulations of the U.S. Government” and had “no conflicting obligations with the U.S. Government,” see AR, Tab 3G-1, Independent Contractor Agreement, CACI did not identify any formal actions it took to exclude X from any aspect of CACI’s proposal preparation efforts.

Following receipt of CACI’s and X’s May 3 responses, the contracting officer considered the information they provided, again consulted with Army counsel and technical and cost/pricing experts, and performed his own analysis. COS/MOL at 8.

On August 24, based on his investigation and analysis, the contracting officer made a preliminary decision that X’s activities on behalf of CACI created, “at a minimum, an appearance of an unfair competitive advantage,” see AR, Tab 3, Preliminary Decision at 23, and documented the basis for that decision in an internal 39-page document, with more than 50 referenced attachments. *Id.* at 1-39.

By letter dated August 24, 2022, the contracting officer notified CACI of his preliminary determination, stating:

This letter is to inform CACI International, LLC (CACI) that in accordance with FAR 3.1, the Government has made the preliminary determination that CACI’s hiring of [X], a recently retired, former government official, as a consultant in its proposal efforts for the upcoming [CHS-6] source selection, creates, at a minimum, the appearance of an unfair competitive advantage and as such, absent additional information from CACI, warrants CACI’s exclusion from the competition.

AR, Tab 4, Notification of Preliminary Decision at 1.

The notification included a summary of the bases for the contracting officer’s decision,<sup>17</sup> first referencing examples of X’s non-public and proprietary information to which X had access under his former government positions, including: “GDMS pricing buildup analysis completed as an Operations Officer”; GDMS’s CHS-5 proposal and its subsequent proposals for technical insertions, delivery orders and task orders;<sup>18</sup> access

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<sup>16</sup> X subsequently described his “recusal,” stating “I withdrew from active participation” in discussions about GDMS’s pricing. AR, Tab 5E, Declaration of X at 9.

<sup>17</sup> The notification did not disclose the 39-page internal document or the specific evidence/attachments referenced in that document.

<sup>18</sup> Technical insertion is the process for adding a product to the contract or modifying a product; a delivery order is an order for a product (hardware or software); and a task

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to CHS Sharepoint and GDMS Dropbox (document sharing websites); “[m]eetings and emails about CHS-5, [i]ncluding cost buildup, [and] configuration management”;<sup>19</sup> “CHS-5 pricing negotiations”; and “information obtained as a result of his CHS-5 SSAC chairperson position.” *Id.* at 1-2.

The notification also summarized the bases for the contracting officer’s determination that the non-public information to which X had access was competitively useful, noting that some of the prices under the CHS-5 contract remained valid into 2023, and expressing the contracting officer’s judgment that the requirements of the prior CHS contracts were “similar enough” to CHS-6 requirements to make information regarding those prior contracts useful in competing for CHS-6. *Id.* at 2. Finally, the letter concluded: “I will withhold my final determination until such time as CACI provides its response, if any, to this letter, to include any proposed mitigation plan it may elect to submit,” and established a response date of August 31, 2022 (subsequently extended to September 6). *Id.* at 3.

On September 6, CACI provided its response to the preliminary determination,<sup>20</sup> and submitted various exhibits including declarations from CACI’s capture manager<sup>21</sup> and from X. Among other things, X’s declaration repeated his earlier representation that: “In my position as Operations Officer [from April 29, 2019 until retirement on November 11, 2019], I did not . . . access non-public and proprietary GDMS information, including information relating to GDMS pricing buildup analysis.”<sup>22</sup> AR Tab 5E, Declaration of X at 2. Referring to X’s declaration that, as operations officer, he did not

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order is an order for a customer service in relation to a product. AR, Tab 10A, PWS at 19-22. Under the CHS-6 solicitation, an offeror’s proposed approach to technical insertions, delivery orders, and task orders will be evaluated regarding the extent to which the proposed approach will be “comprehensive, efficient, effective, cost effective, and benefit the Government.” AR, Tab 10O, CHS-6 RFP § M at 4.

<sup>19</sup> Configuration management is “[a] process for establishing a consistency of a product’s attributes throughout its life,” and allows customers to order the same configuration of a previously ordered item. AR, Tab 10A, PWS at 31-33; Tab 8 Acquisition Plan at 26.

<sup>20</sup> CACI’s response did not include any proposed mitigation plan.

<sup>21</sup> Among other things, the declaration of CACI’s capture manager stated that X “did not provide CACI with non-public and proprietary CHS-4 or CHS-5 pricing, buildup, or GDMS pricing information.” AR, Tab 5A, Declaration of CACI Capture Manager at 5.

<sup>22</sup> With regard to his activities as PdL under the CHS-5 contract, X’s declaration asserted that he “did not have a deep understanding of GDMS non-public and proprietary information”; was a “hands-off leader on daily operations”; and “focused primarily on personnel issues, budgets, speaking to other leaders and building relationships with programs in the community.” AR Tab 5E, Declaration of X at 4.



access “information relating to GDMS pricing buildup analysis,” CACI maintained that X’s declaration “conclusively” resolved that issue. AR, Tab 5, CACI Response to Notification of Preliminary Decision at 8.

On October 7, 2022, the contracting officer made his final decision to exclude CACI, documenting that decision in a 25-page internal document with over 70 referenced attachments and, thereafter, notified CACI stating:

[T]he Government has made a final determination that CACI’s hiring of [X] . . . creates, at a minimum, an appearance of an unfair competitive advantage and as such, warrants CACI’s exclusion from competition. In making this determination, the Government considered the evidence set forth in the Government’s August 24, 2022 Preliminary Determination . . . CACI’s September 6, 2022 Response to the Preliminary Determination and its attached exhibits, and additional evidence that the Government found based on CACI’s response.

AR, Tab 7, Notification of Final Decision at 1.

The notification again summarized the bases for the decision, but did not provide the 25-page internal document or the referenced attachments. In documenting his final decision, the contracting officer concluded that, as a former government employee, X had broad access (described by the contracting officer as “virtually unlimited” and “nearly unfettered,” see AR, Tab 6, Final Decision at 10, 11) to non-public competitively useful information.

Also on October 7, the Army issued the CHS-6 RFP. As subsequently amended, the solicitation established November 22, 2022, as the closing date for submission of proposals.

On October 17, 2022, CACI filed this protest.

On or before the November 22 solicitation closing date, CACI submitted a CHS-6 proposal, notwithstanding the agency’s final decision to exclude CACI. Final Comments at 8 n.3. After the November 22 closing date, it became public knowledge that General Dynamics Information Technology (GDIT) (GDMS’s sister corporation), rather than GDMS, had submitted a CHS-6 proposal. AR, Tab 14A, Supp. Contracting Officer’s Statement at 4-5. The agency states that GDIT’s proposal identifies GDMS as a “major subcontractor.” *Id.*

## DISCUSSION

CACI challenges each element of the contracting officer’s determination, asserting that: (1) X’s prior access to non-public and proprietary information was “very limited,” and that any such information has either become publicly available or is no longer competitively useful; (2) X did not participate in preparing CACI’s proposal; and (3) the

agency failed to reasonably consider CACI's representations that X did not disclose any non-public competitively useful information to CACI, instead applying an "irrebuttable presumption" of disclosure. CACI also asserts that the contracting officer's decision was "unduly delayed"; denied CACI due process; and was flawed because it did not consider the fact that GDIT (rather than GDMS) submitted a CHS-6 proposal.<sup>23</sup>

As discussed below, we conclude that the record reasonably supports the contracting officer's determination that: X had broad access to non-public competitively useful information; X participated in CACI's proposal preparation efforts; and CACI failed to rebut the presumption of disclosure flowing from those facts. Accordingly, we will not substitute our judgment for that of the contracting officer. We also reject CACI's assertions that the contracting officer's decision was unduly delayed; denied CACI due process; or was flawed because it did not consider the fact that GDIT (rather than GDMS) submitted a proposal.

## Access to Non-Public Information and Competitive Usefulness

### Access to Information

First, CACI challenges the contracting officer's determination that, during the periods X served as operations officer and CHS PdL,<sup>24</sup> X had broad access to non-public competitively useful information. In contrast, CACI asserts that X had no access to such information as operations officer, and only "limited" access as the CHS PdL. Protest at 30-33.

As referenced above, in his notification of preliminary decision, the contracting officer advised CACI of his determination that, as operations officer, X "had access to, and accessed . . . [a] GDMS pricing buildup analysis." AR, Tab 4, Notification of Preliminary Decision at 1-2. CACI protests that this determination "ignore[s]" X's declaration, which stated that, "as Operations Officer, I did not . . . access non-public and proprietary GDMS information, including information relating to GDMS pricing buildup analysis." Protest at 30-33; see AR, Tab 5E, Declaration of X at 2. Accordingly, CACI asserts that the contracting officer's determination in this regard is not "supported by evidence" and is "unreasonable." Protest at 30-33.

In responding to CACI's protest, the Army produced the previously-undisclosed investigative record. With regard to X's activities as operations officer prior to his retirement, the record contains documents demonstrating that X not only participated in

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<sup>23</sup> In its various protest submissions, CACI presents arguments that are variations of, or in addition to, those specifically discussed below. We have considered all of CACI's arguments and find no basis to sustain its protest.

<sup>24</sup> X served as SSAC Chair within the period he served as CHS PdL.

an analysis of GDMS's CHS-5 pricing, but that he specifically requested and received detailed information regarding that pricing.

First, the agency references an interview with the former independent government estimate (IGE) team lead, wherein the team lead stated that X was involved in a "Hardware Cost Analysis" in May 2019. See AR, Tab 3L, Interview of IGE Team Lead at 3. In this context, the record contains a spreadsheet sent by the IGE team lead to X on May 14 with an email stating: "See the attached file. You can call me with any questions." AR, Tab 3AB-1, Email from IGE Team Lead to X. The attached spreadsheet was titled "Hardware Mark-up Cost Analysis," and displayed GDMS's CHS-5 markup (in dollars and percentages), for various levels of material costs and quantity ranges. Tab 3AB-1A, Spreadsheet.

By email dated May 15, 2019, X responded, stating:

Thanks for the data. Does GD reduce rates at any time on large dollar buys . . . such as in access [sic] of [redacted] apply. Also, could you send me the rates with Warranty markup.

AR, Tab 3AB-2, Email String at 1.

The IGE team lead sought clarification as to what X was requesting, asking:

Are you looking for warranty rates and markup with warranty? Are you looking for 5 year warranty?

*Id.*

X responded:

I need to see what the OEM [original equipment manufacturer] rates and what the Warranty rate is beyond the OEM only rate. If you have the break out of indirect of Fee, G&A [General and Administrative], Warranty mark ups, please send. [redacted] I don't think we can beat that.

*Id.*; see also AR Tab 6, Final Determination at 10 n.2.

Thereafter, the IGE team lead sent two more CHS-5 spreadsheets to X that listed, by quantity ranges, the number of hours, dollar values, or percentages applicable to line items labeled "Labor Hours," "Hardware Profit Rates," "Warranty Rates," and "Freight Out." AR, Tabs 3AB-2A and 3AB-3A, Spreadsheets.

The contracting officer states that the inconsistency between X's statement that, as operations officer, he "did not . . . access non-public and proprietary GDMS information, including information relating to GDMS price buildup analysis," and the direct evidence to the contrary, was another factor causing the contracting officer to question X's credibility. AR, Tab 14A, Declaration of Contracting Officer at 2.

Similarly, with regard to X's activities as PdL for the CHS-5 contract, CACI protests that the contracting officer ignored the representations in X's declaration regarding the "limited role" X played in GDMS's performance of that contract, and failed to consider the fact that X had no involvement in the Army's CHS-6 acquisition planning.<sup>25</sup> Protest at 20-21, 30-33. In his declaration, X asserted that, as PdL for the CHS-5 contract, he "did not have a deep understanding of GDMS non-public and proprietary information"; was a "hands-off leader on daily operations"; and "focused primarily on personnel issues, budgets, speaking to other leaders and building relationships with programs in the community." See AR Tab 5E, Declaration of X at 4.

In response, the agency refers to the contracting officer's interviews with various government employees who stated that X: was "intimately" or "very much" involved with technology insertions, delivery orders and task orders,<sup>26</sup> see, e.g., AR Tab 3K, Interview of Contracting Officer's Representative; Tab 3M, Interview of Task Order Lead; was "extremely engaged . . . in all facets of the program," see, AR, Tab 3P, Interview of CHS-6 Project Lead; and "understands the IGE template which has all the costs elements built in," see AR, Tab 3L, Interview of IGE Team Lead. The investigative record also includes a screenshot showing that X had access to the GDMS dropbox, see, AR, Tab 6H-5, Screenshot, and a statement from GDMS's Senior Director for Contracts that GDMS submitted its proposals for technical insertions and task orders through the dropbox. AR, Tab 6H-1, Interview of GDMS Senior Director for Contracts at 2.

With regard to X's activities as SSAC chair for the CHS-5 procurement, the agency notes that the record contains X's own statement acknowledging that, during negotiations leading to award of the CHS-5 contract, he "agreed to a GDMS proposed break out of [redacted]," see AR, Tab 3H, Responses of X to Contracting Officer Questions at 3. Additionally, as noted above, the record contains a "Memorandum for [X], Source Selection Advisory Council Chair," on which X concurred, and which he signed, that summarizes several matters addressed during the CHS-5 negotiations, including: GDMS's identification of "cost drivers in the requirements that could be managed or mitigated to minimize cost impact to the customers"; GDMS's initially-proposed rates for certain items; and various negotiated modifications to the solicitation requirements. AR, Tab 3Z, SSAC Brief at 3-8.

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<sup>25</sup> The agency agrees that X "did not have access to CHS-6 specific information when he was a Government employee." COS/MOL at 28.

<sup>26</sup> As noted above, under the CHS-6 solicitation, an offeror's proposed approach to technical insertions, delivery orders, and task orders will be evaluated on the extent to which the proposed approach will be "comprehensive, efficient, effective, cost effective, and benefit the Government." AR, Tab 10O, CHS-6 RFP § M at 4

Finally, the agency states that, in making his final decision, the contracting officer also considered the extent to which X had access to other non-public competitively useful information, referring to X's knowledge about: how GDMS orders spares for warranty sustainment;<sup>27</sup> how GDMS supports expedited requests;<sup>28</sup> GDMS's solutions for repairing items;<sup>29</sup> future government needs;<sup>30</sup> the requirements that the current tracking system for technical insertions, task orders, and delivery orders was built to meet;<sup>31</sup> and different levels of configuration management.<sup>32</sup> Supp. COS/MOL at 26-29; see AR, Tab 6, Final Decision at 18-19.

Based on the documented evidence in the investigative record, the contracting officer maintains that, contrary to CACI's characterization of X's access to non-public information as "limited," X had broad access (described as "virtually unlimited" and "nearly unfettered," see AR, Tab 6, Final Decision at 10, 11) to such information.

### Competitive Usefulness

Next, CACI asserts that, to the extent X had access to non-public, proprietary CHS-5 information, that information is no longer competitively useful due to the "profound" differences between the CHS-5 and CHS-6 contract requirements; differing market conditions and contracting environments; the government's release of previously non-public information; passage of time; and the lack of competition under the CHS-5 contract. Protest at 22-30. With regard to the differences between the two contracts,

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<sup>27</sup> The agency explains that [redacted]. Supp. COS/MOL at 26-29; AR, Tab 14A, Declaration of Contracting Officer at 3.

<sup>28</sup> The contracting officer explains that [redacted], which is not public information. AR, Tab 14A, Declaration of Contracting Officer at 3.

<sup>29</sup> Under the CHS-6 contract the required turnaround time for repairs will be increased from 72 hours to 96 hours. The contracting officer states that X understands that GDMS's past turnaround time has been [redacted] which is not public information. *Id.*

<sup>30</sup> The contracting officer states that, as CHS PdL, X worked with other government programs to learn about, and prepare for, future program needs. X's specific knowledge gained through his activities in this regard is non-public government information unavailable to other offerors. *Id.*

<sup>31</sup> Under CHS-6, offerors must propose a new tracking system. The contracting officer states that X "worked on the [prior system] from the ground up" and, accordingly, has non-public government information regarding what the agency will value in the new system. *Id.*

<sup>32</sup> As noted above, X was involved with, and agreed to accept, GDMS-proposed changes regarding configuration management; the details regarding the cost drivers for configuration management is not public information. *Id.*; see AR, Tab 3H, X's Response to Contracting Officer Questions at 3.

CACI refers to a “detailed analysis” it submitted with its September 6 response to the notification of preliminary decision. *Id.* at 3-4; see AR, Tab 5, Response to Notification of Preliminary Decision at 8-11.

The agency responds that the investigative record reflects the contracting officer’s analyses of the differences and similarities between the CHS-5 and CHS-6 contracts; establishes that he specifically considered CACI’s various submissions; and identified “many incorrect facts and conclusions” in CACI’s analysis. COS/MOL at 28-29; Supp. COS/MOL at 20; see AR, Tab 6 Final Decision at 11-16. Among other things, the contracting officer compared the CHS-5 and CHS-6 contracts with regard to: pricing for design/engineering and program management reviews; the initial items for which pricing is required; elimination of the requirement for a public/private partnership with Tobyhanna Army Depot; consolidation or elimination of equipment categories; changes to quantity ranges; and the technical evaluation factors for both contracts. *Id.* Based on this analysis and his experience as contracting officer for both procurements, the contracting officer concluded that “X’s non-public CHS-5 knowledge could still be used to improve a proposal for CHS-6.” See AR, Tab 6, Final Decision at 11-20.

With regard to differences in contracting environments, including the passage of time, the contracting officer noted that the CHS-5 contract contains prices that are valid until August 2023, and concluded that “despite changes in material prices and other dollar figures (based on passage of time, the pandemic, inflation, supply chain issues, etc.), the percentages, which make up most of the TEP [total evaluated price], concepts and strategies related to cost buildup and technical processes . . . would still be competitively useful for CHS-6.” COS/MOL at 32-33. The contracting officer also considered, and rejected, CACI’s assertions that the competitive usefulness of CHS-5 information was eliminated due to the public release of some previously undisclosed information, or the fact that GDMS was the only offeror for the CHS-5 procurement. See COS/MOL at 29-32; Supp. COS/MOL at 21-22; AR, Tab 3, Preliminary Determination at 19-22, 28-29; AR, Tab 6, Final Determination at 11-17.

Overall, the contracting officer maintains that he “conducted extensive analyses of the differences and similarities between CHS-5 and CHS-6” and, based on that analysis and his personal knowledge, he concluded that, although some of the requirements and market conditions have changed, the two contracts are still sufficiently similar to make CHS-5 information useful in competing for the CHS-6 contract. COS/MOL at 27-28. On this record, the agency maintains that the contracting officer reasonably determined that the non-public information to which X had access was competitively useful. *Id.*; see AR, Tab 6, Final Decision at 11-20.

The assessment of whether an unfair competitive advantage has been created by a firm’s hiring of a former government official is based on a variety of factors, including an assessment of whether the government employee had access to non-public proprietary or source selection sensitive information that was competitively useful. See, e.g., *Science Applications International Corporation*, B-419961.3, B-419961.4, Feb. 10, 2022, 2022 CPD ¶ 59 at 7-8, 13. In this regard, a person’s mere familiarity with the type of

work required is not, by itself, evidence of an unfair competitive advantage. See, e.g., *Geo Owl, LLC*, B-420599, June 13, 2022, 2022 CPD ¶ 143 at 4-5 (former employee's position was in a separate division); *Perspecta Enterprise Solutions, LLC*, B-418533.2, B-418533.3, June 17, 2020, 2020 CPD ¶ 213 at 8 (former employee's position was not within acquisition team's chain of command). Rather, the investigative record must reflect "hard facts" establishing the person's access to non-public information which could form a basis for competitively improving its proposal, thus providing an unfair competitive advantage over offerors without such information. See, e.g., *TeleCommunication Systems Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 2-8; *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 29; cf. *Archimedes Global, Inc.*, B-415886.2, June 1, 2018, 2018 CPD ¶ 179 at 5-7.

Here, based on our review of the record, we do not question the reasonableness of, or the adequacy of the support for, the contracting officer's determination that X had broad access to non-public competitively useful information. As discussed above, the contracting officer sought and considered input from CACI and X, along with information from government and GDMS personnel; gathered and considered relevant documents and emails; sought advice from agency counsel as well as cost/price and technical experts; and performed his own analysis, informed by his personal experience. For example, based on his investigation, the contracting officer reasonably concluded that, contrary to X's representations, X specifically sought and received detailed GDMS pricing information a few months prior to retiring from the government--despite his statements to the contrary. Additionally, the weight of evidence the contracting officer assembled regarding the scope of X's activities as CHS PdL and SSAC chair constituted a reasonable basis to reject CACI's and X's assertions regarding the "limited" scope of X's access to information.

Finally, the record reflects the contracting officer's consideration of the multiple bases advanced by CACI and X for asserting that the non-public information to which X had access was not competitively useful, and his reasonable exercise of judgment in determining that, despite various differences between the two contracts' requirements, differing market conditions, and the passage of time, the non-public information to which X had access remained competitively useful. On the record presented here, we decline to substitute our judgment for that of the contracting officer.

## Participation in Proposal Preparation and Disclosure of Information

### Participation in Proposal Preparation

Next, CACI asserts that X "had no involvement in the preparation of CACI's CHS-6 proposal." Protest at 3. Specifically, in supporting its argument that X did not actually *disclose* any non-public competitively useful information to CACI (discussed in more detail below), CACI asserts that "X was not even involved with **any** aspect of preparing CACI's proposal." Protest at 20. Additionally, CACI more narrowly asserts that X "did not work on cost or pricing for CACI's CHS-6 proposal," maintaining that X "withdrew from active participation" in conversations where GDMS pricing was discussed. *Id.*

at 11, 20-22; see AR, Tab 5A, Declaration of CACI Capture Manager at 5; Tab 5E, Declaration of X at 9.

The agency responds that CACI's representation regarding X's purported lack of involvement with "any aspect of preparing CACI's proposal" conflicts with several portions of the investigative record, including the description of X's activities that CACI, itself, provided in response to the contracting officer's April 18, 2022 notice of concern. Specifically, the agency notes that CACI's response acknowledged that X "was tasked to advise and support CACI's Business Development, Capture, and Proposal Teams in connection with the CHS-6 procurement," and described X's activities as: "reviewing, advising, or developing capture/proposal materials"; "building technical solutions for CACI's proposal for CHS-6"; and "clarify[ing] requirements . . . drawing upon his CHS-5 experience." See AR, Tab 3G, CACI Response to Notice of Concern at 3-5.

The agency further notes that CACI's capture manager identified the various "phases" of CACI's "business development lifecycle," and stated that X participated in "Phase 3," which includes "Initiate Proposal Development." See AR, Tab 5A, Declaration of CACI Capture Manager at 3-5.

Finally, in responding to CACI's assertion that X did not participate in preparing CACI's CHS-6 pricing, the agency notes that CACI has never provided any evidence of formal firewalling procedures or other contemporaneously-documented actions that CACI took to limit the scope of X's input in any manner. Rather, it appears that CACI chose to rely on the terms of X's consulting agreement with DCG,<sup>33</sup> along with X's informal determinations regarding when it was appropriate for him to withdraw from "active participation" in ongoing discussions. Supp. COS/MOL at 5, 24. In short, the agency concluded, based on the evidence presented, that X participated in CACI's proposal preparation efforts.

#### Disclosure of Information

Next, CACI protests that, because the record does not contain direct evidence that X actually disclosed non-public competitively useful information to CACI, and CACI has submitted declarations from various personnel stating that he did not, the contracting officer's determination that X likely disclosed such information to CACI reflected the contracting officer's inappropriate application of an "irrebuttable presumption" of disclosure. Comments and Second Supp. Protest at 2, 11.

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<sup>33</sup> As noted above, in that agreement, X stated that he would "comply with all applicable laws and regulations of the U.S. Government . . . including but not limited to matters of procurement integrity" and had "no conflicting obligations with the U.S. Government based on prior service . . . that could present a conflict of interest." See AR, Tab 3G-1, Independent Contractor Agreement at 3-4



The agency responds that, as discussed above, the contracting officer's final decision was based on the evidence the contracting officer assembled during his investigation, from which he concluded that: X had broad access to non-public information that was competitively useful; and X participated in CACI's proposal preparation efforts. Further, the agency states that the contracting officer: considered the information and representations submitted by and on behalf of CACI in response to his notice of concern and notification of preliminary decision; considered the credibility of CACI's and X's submissions, including X's representation that, as operations officer, he did not have access to GDMS's pricing; and reasonably concluded that CACI had failed to rebut the contracting officer's assessment that X likely disclosed information to CACI, thereby creating an unfair competitive advantage or "at a minimum, an appearance of an unfair competitive advantage." AR, Tab 7, Notification of Final Decision at 1. Based on the evidence the contracting officer assembled supporting these conclusions, the agency maintains that the contracting officer reasonably determined that CACI's exclusion from the CHS-6 procurement was warranted.

Contracting agencies are directed to avoid even the appearance of impropriety in government procurements. FAR 3.101-1.<sup>34</sup> Thus, where an offeror chooses to hire a former government official who has had recent access to non-public competitively useful information, and uses that official to help prepare the offeror's proposal, there is a rebuttable presumption of prejudice.<sup>35</sup> See, e.g., *Dell Servs. Fed. Gov't, Inc.*, B-414461.3 *et al.*, June 19, 2018, 2018 CPD ¶ 213. This presumption is consistent with the fact that judgments involved in preparing a proposal may be shaped by knowledge of the non-public information. See *Holmes & Narver Services, Inc./Morrison Knudson Services, Inc., a joint venture; Pan Am World Services, Inc.*, B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 7. Accordingly, a proposal may be properly

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<sup>34</sup> We have recognized that, although there are certain procedural differences between an agency's consideration of an unfair competitive advantage under FAR subpart 3.1 and an agency's consideration of unequal access to information under FAR subpart 9.5, see, e.g., *Northrop Grumman Systems Corp.*, B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 6-8, the standard for assessing a potential unfair competitive advantage under FAR subpart 3.1 is "virtually indistinguishable" from the standard for evaluating whether a firm had an unfair competitive advantage arising from its unequal access to information under FAR subpart 9.5. See, e.g., *Science Applications International Corporation, supra*; *Unisys Corp.*, B-403054.2, Feb. 8, 2011, 2011 CPD ¶ 61 at 5.

<sup>35</sup> The presumption may be rebutted where, for example, the record shows that the individual with access to non-public competitively useful information was firewalled from personnel engaged in proposal preparation activities. *Dell Servs. Fed. Gov't, Inc.*, B-414461.3 *et al.*, June 19, 2018, 2018 CPD ¶ 213 at 7 n.8; see also, *Netstar-1 Government Consulting, Inc.*, B-404025.2, May 4, 2011, 2011 CPD ¶ 262 at 8.

disqualified based on the appearance of an unfair competitive advantage,<sup>36</sup> as long as the determination is based on facts and not suspicion or innuendo. *TeleCommunication Systems Inc.*, *supra*; *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28 n.15; *Aetna Gov't. Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 17-19; see *NKF Eng'g, Inc. v. U.S.*, 805 F.2d 372 (Fed. Cir. 1986). Whether an appearance of impropriety based on an alleged unfair competitive advantage exists depends on the circumstances in each case. Ultimately, the responsibility for determining whether an offeror should be allowed to continue to compete is a matter for the contracting agency, and our Office will not substitute our judgment for that of the agency unless the decision is shown to be unreasonable. *Science Applications International Corporation, supra*.

Here, based on our review of the record, we find no basis to question the reasonableness of the agency's decision. First, as discussed above, in concluding that X had broad access to non-public competitively useful information, the record establishes that the contracting officer sought and considered input from CACI and X, along with information from government and GDMS personnel; gathered and considered relevant documents and emails; sought advice from agency counsel as well as cost/price and technical experts; and performed his own analysis. In assessing the scope of non-public competitively useful information to which X had access, the contracting officer reasonably considered the credibility of X's representations--including his assertion that, as operations officer, he did not have access to GDMS's pricing information--and compared that representation to documented evidence establishing that not only did he have access to such, he sought and received additional detailed information.

Further, the record reflects the contracting officer's consideration of the competitive usefulness of the non-public information to which X had access, documenting his consideration of the multiple bases advanced by CACI and X for asserting that the information was not competitively useful, and exercising his informed judgment in determining that, despite various differences between the contracts' requirements, differing market conditions, and the passage of time, the non-public information to which X had access remained competitively useful in that it could be used to improve a CHS-6 proposal.

Next, the record reflects the bases for the contracting officer's determination that X was involved in CACI's proposal preparation--specifically including CACI's own statements that X "was tasked to advise and support CACI's Business Development, Capture, and Proposal Teams in connection with the CHS-6 procurement," and CACI's description of

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<sup>36</sup> The appearance of an unfair competitive advantage is created where a "disinterested observer knowing all the facts and the applicable law" would see something improper, see *Booz Allen Hamilton, Inc.*, B-418125, B-418125.2, B-418125.3, Jan. 15, 2020, 2020 CPD ¶ 28 at 10.

X's specific activities as including: "reviewing, advising, or developing capture/proposal materials"; "building technical solutions for CACI's proposal for CHS-6"; and "clarify[ing] requirements . . . drawing upon his CHS-5 experience." See AR, Tab 3G, CACI Response to Notice of Concern at 3-5. On this record, the contracting officer reasonably rejected CACI's assertion that X was not involved with "any aspect of preparing CACI's proposal."

Further, with regard to CACI's assertion that X "did not work on cost or pricing for CACI's CHS-6 proposal," the contracting officer reasonably noted that there is no evidence of formal firewalling procedures or other contemporaneously documented actions that CACI took to limit the scope of X's input to CACI's proposal in any manner. Rather, it appears that CACI chose to rely on the terms of X's agreement with the consulting firm, DCG, along with X's informal determinations regarding when it was appropriate for him to "withdr[aw] from active participation" in ongoing discussions. In this context, as noted above, the rebuttable presumption flowing from the facts here reflects the reality that judgments involved in preparing a proposal may be shaped, consciously or subconsciously, by knowledge of the restricted information. See, e.g., *Holmes & Narver Servs. et al.*, B-235906, B-235906.2, *supra*.

Finally, in considering whether CACI rebutted the presumption of prejudice, the contracting officer reasonably considered the credibility of CACI's representations, along with the fact that there is no evidence, other than the various conclusory representations submitted by CACI and the provisions of X's agreement with DCG, that CACI took any meaningful precautions to limit X's participation in CACI's proposal preparation efforts.

As noted above, the determination regarding an appearance of impropriety due to an alleged unfair competitive advantage depends on the circumstances of each case, and the responsibility for determining whether an offeror should be allowed to compete is primarily a matter for the contracting agency. Our Office will not substitute our judgment for that of the agency unless it is shown to be unreasonable. In this regard, CACI has not established that the agency's decision was unreasonable and, on the record here, we decline to substitute our judgment for that of the agency.

#### Undue Delay

Additionally, in challenging the agency's determination to exclude CACI from the CHS-6 procurement, CACI complains about the "timing" of the agency's action, asserting that the contracting officer "unduly delayed" his determination and failed to comply with the provisions of FAR section 9.504(a)(1), which directs contracting officers to identify and evaluate conflicts of interest "as early in the acquisition process as possible."<sup>37</sup> Protest

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<sup>37</sup> As noted above, we have recognized there are certain procedural differences between FAR subpart 3.1 investigations and FAR subpart 9.5 investigations.

(continued...)

at 2, 16-18. More specifically, CACI complains that the contracting officer knew X was participating in CACI's pursuit of the CHS-6 contract following the October 25, 2021 meeting; yet, he did not notify CACI of any concerns until April 2022; and he did not make a final determination to exclude CACI until October 2022, a few weeks prior to the due date for submission of proposals. *Id.* Accordingly, CACI asserts that the timing of the agency's actions left "insufficient time for CACI to take any action to mitigate the alleged unfair competitive advantage." *Id.* at 18.

The contracting officer responds that any determination he made regarding the alleged unfair competitive advantage had to be supported by sufficient evidence, and that any failure to sufficiently document his determination could form a basis for a subsequent challenge to its validity. COS/MOL at 12-17. Accordingly, he maintains that he "clearly and reasonably balanced the importance and necessity of conducting a thorough and meaningful investigation, with meeting the desire of all parties to . . . move forward with the procurement." *Id.*

Based on our review of the record here, we reject CACI's assertion that the agency "unduly delayed" its determination to exclude CACI. To the contrary, the record reflects the contracting officer's reasonably diligent and thorough initial investigation that included written communications and interviews with multiple personnel; his consideration of input from multiple sources, including requests for information from CACI in both April 2022 and August 2022; his analysis and further investigation based on the input he received; and his documentation of his final determination in October 2022. On the record here, we find no basis to question the timing of the agency's decision to exclude CACI.

#### Due Process

Next, CACI asserts that the agency's investigation deprived CACI of due process. Protest at 33-35. In this regard, CACI notes that, prior to responding to this protest, the agency did not disclose to CACI the specific evidence it had assembled during its investigation and, therefore, maintains that the agency "withheld . . . material information relevant to its determination." *Id.* at 10. On that basis, CACI complains that: "[i]t is patently unreasonable to disqualify an offeror from competing for a federal procurement without even giving it an opportunity to respond to the allegations." *Id.* at 33.

As discussed in detail above, the agency notified CACI in April 2022 that it was seeking information to determine "whether CACI may have obtained an unfair competitive

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Nonetheless, we find it unnecessary to address that issue here since, even assuming applicability of the FAR subpart 9.5 requirement to identify and evaluate the alleged unfair competitive advantage "as early in the acquisition process as possible," the contracting officer's actions reasonably complied with that requirement.

advantage if it hired a former government employee with knowledge of non-public information.” AR, Tab 3E, Notice of Concern. Further, in its notification of preliminary decision in August 2022, the contracting officer advised CACI with regard to X’s access to non-public competitively useful information, including: “GDMS pricing buildup analysis completed as an Operations Officer”; GDMS’s CHS-5 proposal and its subsequent proposals for technical insertions, delivery orders and task orders; access to CHS Sharepoint and GDMS Dropbox (document sharing websites); “meetings and emails about CHS-5, including cost buildup, [and] configuration management”; “CHS-5 pricing negotiations”; and “information obtained as a result of his CHS-5 SSAC chairperson position.” *Id.* at 1-2.

The notification further summarized the bases for the contracting officer’s determination that the non-public information to which X had access was competitively useful, noting that some of the prices under the CHS-5 contract remained valid into 2023, and expressing the contracting officer’s judgment that the requirements of the prior CHS contracts were sufficiently similar to make information regarding those prior contracts useful in competing for CHS-6. *Id.* at 2. Finally, the notification concluded: “I will withhold my final determination until such time as CACI provides its response, if any, to this letter, to include any proposed mitigation plan it may elect to submit,” and established a response date of August 31, 2022 (subsequently extended to September 6). *Id.* at 3.

CACI responded on September 6, but did not submit any proposed mitigation plan. Rather, CACI presented many of the challenges to the agency’s decision that are discussed, and rejected, above. On this record, we reject CACI’s assertions that the agency made its decision to exclude CACI from the CHS-6 procurement “without . . . giving [CACI] an opportunity to respond to the allegations” or that CACI was deprived of due process. *Id.* at 33.

#### Submission of Proposal by GDIT

Finally, CACI asserts that the contracting officer’s final decision was flawed because it was made without knowing that GDIT, rather than GDMS, would submit a proposal for the CHS-6 contract. In this context, CACI asserts that the contracting officer’s decision was based on his concern that X’s knowledge could harm GDMS’s competitive standing. Comments and Second Supp. Protest at 26-27. Accordingly, CACI asserts that the contracting officer’s conclusions regarding the competitive usefulness of GDMS’s non-public information are no longer valid since GDIT “has different overhead, G&A, and direct labor rates” and “there is no reason to assume that GDIT would have the same technical information, such as processes and solutions for achieving CHS-6’s goals as GDMS.” *Id.*

The agency first responds that GDIT’s proposal offers GDMS as “a major subcontractor to ensure retention of key program staff and continuity of institutional knowledge . . . [and] to leverage proven processes, facilities, and tools to continue the CHS mission without disruption.” AR, Tab 14A, Declaration of Contracting officer at 4-5. Next, the

contracting officer states that, although at the time he made his final decision, he expected GDMS to submit a proposal as the prime contractor, his decision regarding an actual or apparent unfair competitive advantage was based on X's access to non-public competitively useful information (including both proprietary information of the currently-performing incumbent contractor and government information) that would provide CACI with an advantage over any other offeror that did not possess such information. *Id.* As such, the competitive usefulness of the information was not based on, or affected by, a projection of which firms would, or would not, submit proposals. Accordingly, the contracting officer maintains that his determination regarding the existence of an actual or apparent unfair competitive advantage was not (and would not be) affected by knowing what companies would, or would not, submit proposals. *Id.*

As noted above, where an offeror chooses to hire a former government official who has had recent access to non-public information that could be used to competitively improve a proposal, and uses that official to help prepare the offeror's proposal, the firm can be disqualified from a competition based on the appearance of impropriety created by that situation. See, e.g. *Health Net Fed. Servs., LLC*, supra.

Here, as discussed above, the contracting officer's decision was reasonably based on the evidence he assembled during his investigation regarding X's access to non-public information that would be useful for improving a CHS-6 proposal, along with X's participation in CACI's proposal preparation efforts. As also discussed above, the contracting officer's determination was not based on, or affected by, a projection of which companies would or would not submit proposals. Rather, the determination was based on X's access to non-public information that would provide an advantage over any other offeror without such information. Accordingly, we do not question the contracting officer's judgment that his current knowledge regarding the companies that have, or have not, submitted proposals does not form a basis for altering his prior decision.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel