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Decision

Matter of: Raytheon Intelligence & Space, Electronic Warfare Self Protect Systems

File: B-421672.1; B-421672.2

Date: August 17, 2023

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DIGEST

1. Protest of exclusion from the competition is denied where the documented record supports the agency's reasonable conclusion that the protester's hiring and employment of a former government employee created an actual or apparent unfair competitive advantage.
2. Agency's determination regarding an actual or apparent unfair competitive advantage was not unduly delayed.

DECISION

Raytheon Intelligence & Space, Electronic Warfare Self Protect Systems, of Goleta, California, protests the Department of the Navy, Naval Air Systems Command's (NAVAIR) decision to exclude Raytheon from competing under request for proposals (RFP) No. N00019-21-R-0050, for the engineering, manufacturing, and development (EMD) of a dual band decoy (DBD). Raytheon contends that the agency's decision to exclude the firm from the competition because of an actual or apparent unfair competitive advantage resulting from the employment of a former government employee was unreasonable, and so delayed that it deprived Raytheon of any opportunity to mitigate the issue.

We deny the protest.

BACKGROUND

The DBD program is intended to replace the currently fielded decoys used in the F/A-18E/F aircraft by “developing and implementing an expanded next generation towed radio frequency (RF) self-protection decoy on the aircraft.” Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 5.¹ Due to the next generation requirements and the existing industry capabilities at the time the DBD program was established, the Navy decided to use an evolutionary (or phased) approach to the procurement. *Id.* For the first phase--the demonstration of existing technologies (DET)--NAVAIR’s Advanced Tactical Aircraft Protection Systems Program (PMA-272) awarded two DBD DET contracts; the purpose of which was to “increase the Government’s knowledge and understanding regarding existing technologies that could be applied toward the development of an expanded DBD.” *Id.* at 6. For this next phase--the DBD EMD--NAVAIR anticipates award of a single cost-plus-inventive-fee contract for the engineering to design, develop, integrate, test, and produce the DBD. Protest at 8.

The former government employee who is relevant to this protest (referred to throughout this decision as X) was employed by the Navy at the Naval Warfare Center Weapons Division (NAWCWD),² beginning in October 1989, as a mathematician. Agency Report (AR), Exh. A, Determination & Findings (D&F) at 7. From 2012 to 2014, X completed a rotational tour with PMA-272, where he received his first exposure to DBD technology. *Id.* Returning to NAWCWD in 2014, X worked as the Chief Technologist for the Defensive Electronic Warfare (EW) Division and the Multi-Spectral EW System Support Activity Integrated Product Team of NAVAIR, serving “as an EW technology advisor for NAVAIR in general” and consulted on many Navy programs “over his years of Government service due to his knowledge and experience concerning [radio frequency] countermeasures in the areas of threat identification, techniques for detecting those threats, and testing of countermeasures.” *Id.*

Between 2014 and 2016, X “participated in the preparation of an effects-based EW model for the F/A-18E/F in order to test the effectiveness of the landscape of conceptual and/or emerging EW countermeasures that aircraft could potentially utilize against an emerging threat.” *Id.* Among the countermeasures modeled was the DBD. *Id.* at 8. Although X “was not officially a member of NAVAIR’s DBD DET team,” X has acknowledged supporting the DBD program starting in 2017, including reviewing a draft of “what would eventually become the DBD DET Goals Document” and making recommendations about testing procedures, practices, and requirements to that document, as well as other plans and draft documents for the DBD DET acquisition. *Id.* Shortly before the Navy issued the broad agency announcement for the DBD DET acquisition in 2018, X confirmed he was able to access a restricted-access network

¹ Citations to the record are to the documents’ Adobe PDF pagination.

² NAWCWD is a subordinate command of NAVAIR.

share drive that contained a secured folder with source selection sensitive information. As a result, X was asked to sign a non-disclosure agreement for the effort. *Id.* at 9-10. After the DBD DET contracts were awarded--to BAE Systems and Raytheon--in May and June 2019, X continued to provide technical support to the work. *Id.* at 10.

Meanwhile, in November 2019, X contacted a senior director at Raytheon with cognizance over the firm's DBD program, regarding employment opportunities. AR, Exh. A-2, X Declaration at 1. In December 2019, X met with the Systems Engineering director for Raytheon's EW Business Unit, who advised "that Raytheon was seeking a Senior Manager Systems Engineering and Test Director to support the integration, verification, and testing of Raytheon's [DBD] technologies in performance of the DET contract." AR, Exh. A, D&F at 11. X then applied for the position on December 14. *Id.*

On January 6, 2020, X told his direct supervisor at NAWCWD that he planned to retire from government service and work for Raytheon. *Id.* at 11-12. On January 13, Raytheon offered X a position as senior manager systems engineering, the test director for all of Raytheon's emerging programs, including DBD. *Id.* at 12. X accepted on January 15 and applied for immediate retirement from NAWCWD on January 16. *Id.*

On February 19, X submitted a post-government employment advice opinion request. AR, Exh. A-39, Opinion Request. X described his position with NAWCWD as "systems engineer in the Self-Protection [EW] division. My primary duties include research, development, test and evaluation of self-protection jamming systems." *Id.* at 2. X did not refer to DBD in the request. *Id.* On March 2, the NAWCWD Office of General Counsel issued a post-government employment opinion letter to X. AR, Exh. A-1, Opinion Letter. The letter advised X of restrictions on "represent[ing] anyone else before the government in connection with particular matters" in which he had personal and substantial participation or that were pending under his official responsibility. *Id.* Because X's request did not disclose any involvement with the DBD program, the letter, consequently, also did not reference DBD. The letter, however, provided the following warning: "This opinion is based on the factual information you supplied. . . . If there are additional facts that were not disclosed they may invalidate the conclusions reached in this opinion." *Id.* at 1.

X continued to work for NAWCWD, including communicating with other government personnel about DBD, until March 27. AR, Exh. A, D&F at 12-14. This included continued access to "NAWCWD's restricted [Microsoft] sharepoint site, which included files from both BAE [Systems] and Raytheon in support of DBD DET performance, such as bi-weekly meeting briefs and Contract Data Requirements List (CDRL) deliverables." *Id.* at 10.

X began working for Raytheon on April 20. *Id.* at 14. At Raytheon, X was responsible for developing test procedures for and execution of the test and verification strategy of the DBD, authoring and approving work products delivered to the Navy and representing Raytheon at meetings with the Navy about the DBD. *Id.* at 14-15. While X was working for Raytheon, in December 2020, the Navy issued a request for

information (RFI) regarding the DBD EMD effort; X contributed to Raytheon's response. *Id.* at 18. The Navy then published a draft RFP for the DBD EMD in April 2021; X attended the presolicitation conference on behalf of Raytheon. *Id.* at 19. X resigned from Raytheon effective May 14. AR, Exh. A-2, X Declaration at 3.

On June 14, NAVAIR released the RFP for the DBD EMD. AR, Exh. A-26, RFP at 1. The agency received two proposals--from Raytheon and BAE Systems--by the July 29, deadline for receipt of proposals. COS/MOL at 15. In August 2022, while evaluations were ongoing, a technical evaluator raised a question about the circumstances of X's retirement from NAWCWD and employment with Raytheon. AR, Exh. A, D&F at 5 n.1. The contracting officer then "launched an extensive inquiry into whether X's involvement with the DBD program created an actual or apparent conflict of interest that compromised the integrity of the pending DBD EMD award." *Id.* at 6.

By letter dated September 6, with the subject "Potential Conflict of Interest; Dual Band Decoy Solicitation Number N00019-21-R-0050," the contracting officer informed Raytheon that the agency had just learned of a potential conflict of interest regarding X, a former government employee. AR, Exh. A-27, Notice of Potential Conflict. Accordingly, the contracting officer asked Raytheon to respond to various questions regarding the circumstances of X's hiring and his work at Raytheon. *Id.* On September 12, Raytheon responded to the contracting officer. AR, Exh. A-17, Resp. to Notice of Potential Conflict. Raytheon explained, among other things, that based on the company's understanding, X's "very minor involvement with the NAVAIR DBD program while still employed by the government did not trigger a need to bar him from working on the program while at Raytheon." *Id.* at 2.

On October 21, the contracting officer sent a second letter to Raytheon with "follow-up questions" regarding X's hiring and the nature of any contributions to the DBD EMD proposal. AR, Exh. A-33, Notice of Potential Conflict - Part Two at 1. On October 25, Raytheon responded to the follow-up questions with additional detail about X's hiring.³ AR, Exh. A-34, Resp. to Notice of Potential Conflict - Part Two. Raytheon acknowledged that X supported Raytheon's DBD team for the RFI response and attended the presolicitation conference hosted by NAVAIR on May 12, 2021. However, according to Raytheon, X "had submitted his resignation from Raytheon nine (9) days prior [to the conference] and would leave the company just two days after the conference" and had therefore "provided no input for the subsequent Raytheon DBD EMD proposal." *Id.* at 2.

³ In September and October, the contracting officer also notified BAE Systems regarding the potential conflict of interest, and requested and received information from BAE Systems about, among other things, "any non-public proprietary information that [X] may have received from BAE [Systems] prior to his retirement." AR, Exh. A-29, Letter to BAE Systems; AR, Exh. A-30, BAE Systems Resp.; AR, Exh. A-31, Follow-Up Letter to BAE Systems; AR, Exh. A-32, BAE Systems Follow-Up Resp.

By letter to Raytheon dated November 28, 2022, with the subject “Notification of Potential Exclusion from Dual Band Decoy Competition; Solicitation Number N00019-21-R-0050,” the contracting officer notified Raytheon that he had “identified a potential significant conflict of interest concerning Raytheon’s employment of [X] . . . [that] may result in Raytheon being excluded from further consideration in this competition.” AR, Exh. A-35, Notice of Potential Exclusion at 1. The contracting officer identified the “relevant facts and information” that “potentially create a significant conflict of interest” and invited Raytheon to submit “any facts or information that you believe avoid, neutralize, or mitigate this potential conflict of interest to support a decision not to exclude Raytheon from the competition.” *Id.* at 1-2.

On December 16, Raytheon responded, explaining that it took the contracting officer’s “concerns seriously and [had] conducted an extensive investigation into the issues” raised, including interviewing X and his colleagues at Raytheon. AR, Exh. A-36, Resp. to Notice of Potential Exclusion at 1. According to Raytheon, “it exercised extreme care when hiring [X] and examining potential conflicts,” and many of the facts cited by the contracting officer were “inaccurate and/or neither necessitate nor justify exclusion of Raytheon under the law.” *Id.* Raytheon again asserted that “neither [X] nor Raytheon are aware of any work he performed while employed by NAWCWD that could be considered personal or substantial with respect to DBD EMD.” *Id.* at 7. In addition, the firm characterized X’s “activities with respect to DBD EMD while at Raytheon” as “limited,” clarifying, however, that contrary to its earlier statement, X did, in fact, have a role in Raytheon’s DBD EMD proposal development, although it was “not significant.” *Id.*

Following receipt of Raytheon’s response, the contracting officer considered the information provided, consulting with agency counsel as he had “throughout this process.” AR, Exh. A, D&F at 6. On April 14, 2023, the contracting officer completed his investigation into the potential unfair competitive advantage organizational conflict of interest (OCI), determining:

[X’s] actions created, at minimum, the appearance of a conflict of interest. After failing to properly recuse himself [from work involving Raytheon], he also failed to disclose his DBD involvement to the Government’s ethics counsel. Still, [X] was advised of his post-Government employment statutory restrictions and obligations; however, [X] continued to fail to recuse himself, creating at minimum an appearance of impropriety. [X] had access to non-public, competitively useful information that could have provided Raytheon with an unfair competitive advantage on the DBD EMD source selection. There is no evidence that [X] took appropriate measures to avoid the conflict of interest. After Raytheon hired [X], there is no evidence that Raytheon took appropriate measures to mitigate the conflict of interest by, for instance, firewalling [X’s] participation on DBD. In fact, [X] represented and appeared back to the Government on behalf of Raytheon concerning matters that [X] participated in as a Government employee. It is my determination that [X’s] actions compromised the

integrity of the DBD EMD Source Selection such that the Government is now required to neutralize what, at minimum, is the appearance of a significant unfair competitive advantage for Raytheon.

Id. at 51. The contracting officer's review and analysis was documented in a 51-page Determination and Findings, with more than 50 referenced exhibits. *Id.* at 1-53.

On April 24, 2023, based on the contracting officer's investigation and recommendation, the Director of NAVAIR's Procurement Group concurred with the contracting officer's findings and "agree[d] that these circumstances warrant removing Raytheon from the DBD EMD source selection."⁴ AR, Exh. B, Decision Memorandum to Remove Raytheon at 3. The Navy then notified Raytheon of its exclusion the same day. AR, Exh. D, Notice of Exclusion.

This protest followed.

DISCUSSION

Raytheon challenges each element of the contracting officer's determination, asserting that the Navy has not shown an "adverse impact on the DBD EMD procurement" that would justify exclusion from the competition where: (1) X's work on the DBD program was "minimal" and any non-public or proprietary information accessed as a result of that minimal work has either become publicly available or is no longer competitively useful; (2) there was nothing improper in Raytheon's hiring of X to support the DBD program; and (3) there is no evidence that Raytheon's proposal contains proprietary or non-public information of its competitor, BAE Systems. Protest at 30-47; Comments at 25-26. Raytheon also asserts that the agency took "an unreasonable amount of time identifying and investigating [the] issues," with the delay "impacting Raytheon's due process rights" and resulting in an improper sole-source procurement. Protest at 47-48; 1st Supp. Protest at 3-7.

As discussed below, we conclude that the record reasonably supports the contracting officer's determination that X was personally involved in the DBD program as a government employee, with access to non-public and competitively useful information, while, at the same time, X was seeking and accepting employment with Raytheon to support the program. Accordingly, we will not substitute our judgment for that of the contracting officer--that excluding Raytheon was necessary to preserving the integrity of the DBD EMD procurement. We also reject Raytheon's assertions that the contracting

⁴ The RFP here was released as a full and open competition. Although this is a pre-award protest, we granted BAE Systems's request to intervene after the agency confirmed that, "[a]s a result of Raytheon's exclusion from the DBD EMD source selection, BAE [Systems] currently is the only remaining offeror in the competition." Resp. to BAE Request for Reconsideration of Req. to Intervene at 1; see also *Bannum Inc.*, B-411074.5, Oct. 10, 2017, 2017 CPD ¶ 313 (permitting intervention in protest of pre-award elimination from the competition where intervenor was only other offeror).

officer's decision was unduly delayed or resulted in an improper sole-source procurement.

The DBD Program

The general theme of Raytheon's arguments that the agency acted unreasonably in excluding Raytheon from the DBD EMD competition is that "the Navy has not identified any actual impact or taint on the procurement from the alleged apparent conflict of interest," and therefore improperly excluded Raytheon merely for hiring an individual who previously worked for the Navy. See, e.g., Protest at 43, 46-47. For the reasons discussed below, we conclude that the agency reasonably exercised its discretion to exclude Raytheon in order to avoid even the appearance of impropriety in the DBD EMD competition.

Access to Non-Public, Competitively Useful Information

First, Raytheon challenges the contracting officer's determination that, during the time X served as Chief Technologist for the Defensive EW Division and the Multi-Spectral EW System Support Activity Integrated Product Team of NAVAIR, X had access to non-public competitively useful information about DBD. In contrast, Raytheon characterizes X's work on the DBD program as very minimal and asserts that the agency's analysis has "no discussion, much less analysis, as to whether [X] actually gained access to or actually accessed any documents." Protest at 30-44.

The agency responds that the record shows that the agency did consider X's specific access to information by virtue of his work at NAWCWD. COS/MOL at 28-29. The contracting officer relied on a variety of specific examples of X's access, including, for instance, that X had access to NAWCWD file sites that included information about the DBD DET acquisition and DBD DET performance. *Id.* at 32-35.

Raytheon does not deny that X had "access to (1) the Government's restricted DBD DET sharedrive containing non-public, source selection information, including DBD DET proposal information from all offerors, and (2) NAWCWD's restricted Share Point site containing non-public DBD DET contract performance information of all DET awardees." Protest at 31. Instead, Raytheon argues that this access is insufficient to support the contracting officer's conclusions. According to Raytheon, the contracting officer failed to reasonably consider that X represented in declarations that (1) he had only two months of access to the DBD DET sharedrive because he did not ultimately support the DBD DET evaluation and source selection and (2) he never accessed any document on the Share Point site. *Id.* at 31.

The Navy counters that the contracting officer did consider X's representations in response to the investigation, but also considered additional "hard facts" about access, including a contemporaneous email confirming access to one of the sites. COS/MOL at 32-34. Additionally, the contracting officer took into account the reliability and credibility of X's representations, given that Raytheon and X had to correct or clarify

earlier representations denying any access to the information described above, and given statements by other government personnel confirming that X had access to the information--and that X needed such in order to support the DBD DET program. *Id.*

Second, Raytheon asserts that, to the extent X had access to any non-public, proprietary DBD information, that information was confined to DBD DET and is no longer non-public because the results of X's work were released to all potential offerors, or no longer competitively useful because of the differences between the DBD DET phase and the DBD EMD phase, as well as the passage of time. Protest at 30-31. For example, Raytheon discounts X's access to the NAWCWD sharedrive and Share Point because any information contained there pertained to DBD DET, rather than DBD EMD, which Raytheon reiterates is "the procurement for which Raytheon is being excluded." Protest at 31.

In response to another example of access identified in the contracting officer's analysis, Raytheon acknowledges that X "participat[ed] in establishing the Government's DBD requirements in February 2018," but argues there is no impropriety as a result, because X's participation occurred "approximately two (2) years before [X] left the Government and 3-1/2 years before the solicitation for the EMD phase was issued." Protest at 30. Raytheon also asserts that the result of X's work was the DBD DET Goals document that was "released to the potential offerors long before [X] retired from the Government and joined Raytheon." *Id.*

The Federal Acquisition Regulations (FAR) prohibits conflicts of interest in the government's procurements, directing agencies to "avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships."⁵ FAR 3.101-1; see FAR 9.504; *VSE Corp.*, B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 at 7. Where an offeror chooses to hire a former government official who has had recent access to competitively useful information, and uses that official to help prepare the offeror's proposal, the proposal may be properly disqualified based on the appearance of an unfair competitive advantage. *Serco Inc.*, B-419617.2, B-419617.3, Dec. 6, 2021, 2021 CPD ¶ 382 at 12. In this context, we will review the reasonableness of an agency's determination with regard to an unfair competitive advantage. *Id.*

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

⁵ Our Office has recognized that the standard for evaluating whether a firm has an unfair competitive advantage under FAR subpart 3.1 stemming from its hiring of a former government employee is "virtually indistinguishable" from the standard for evaluating whether a firm has an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest under FAR subpart 9.5. *Northrop Grumman Sys. Corp.*, B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 6-8.

or source selection sensitive information that was competitively useful. See, e.g., *CACI, Inc.-Fed.*, B-421224 *et al.*, Jan. 23, 2023, 2023 CPD ¶ 35 at 14. 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 Enter. Sols., 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 nonpublic 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 Sys. Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 2-8.

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 access to non-public competitively useful information. As discussed above, the contracting officer sought and considered input from Raytheon and BAE Systems, along with information from X and relevant government personnel; gathered and considered relevant documents and emails; sought advice from agency counsel; and performed his own analysis. AR, Exh. A, D&F. For example, based on his investigation, the contracting officer reasonably concluded that--even after X contacted Raytheon regarding potential employment in November 2019--X continued to contribute to discussions within the Navy about DBD requirements. *Id.* at 12-13. Additionally, the weight of evidence the contracting officer assembled regarding the scope of X's activities in support of DBD and the interrelationship of the DET and EMD phases constituted a reasonable basis to reject Raytheon's and X's position that X's involvement in, and access to information about, DBD was limited. See, e.g., *id.* at 24-25 (discussing the interrelated nature of DBD DET and DBD EMD). The contracting officer explains his conclusion "that DBD DET and DBD EMD are two phases of one continuous development effort" based on, for example, the DBD DET Goals document that X worked on while he was a Navy employee:

The DBD DET contracts included a DBD Goals Document that provided detailed goals to address capabilities compatible with the current and future DBD mission needs; as such, it set the baseline for what would become the DBD EMD System Performance Specification (SPS). Under the DBD DET contracts, Contractors would mature the DBD design while measuring the performance relative to the DBD Goals Document. The resulting performance data would be used to refine, in part, the DBD Goals Document to become the DBD EMD SPS.

Id. at 24.

Finally, the record reflects the contracting officer's consideration of the multiple bases advanced by Raytheon for asserting that the non-public information to which X had access was either released to all offerors or not competitively useful, and his reasonable

exercise in judgment that, despite the release of information in the DBD solicitations, distinctions between DBD DET and EMD phases of the program, and the passage of time, the non-public information to which X had access remained competitively useful. See, e.g., *id.* at 40 (considering and rejecting Raytheon's contention that the information X accessed was "stale"). On the record presented here, we decline to substitute our judgment for that of the contracting officer.

Disclosure of Non-Public, Competitively Useful Information

Next, Raytheon contends the record does not contain direct evidence that X actually disclosed non-public competitively useful information to Raytheon, and that Raytheon has submitted declarations from various personnel stating that X had not disclosed such information. Therefore, in Raytheon's view, the contracting officer's determination regarding a conflict of interest was unreasonable. Specifically, Raytheon argues that "there must be hard evidence that the offeror, and not just the former government employee, has received" non-public or proprietary competitively useful data. Protest at 38-39. According to Raytheon, there is no such hard evidence "given that the agency examined Raytheon's proposal and could not identify any instance where it appeared that Raytheon had included non-public or another offeror's proprietary information in its proposal."⁶ *Id.* at 36.

As discussed above, contracting agencies are directed to avoid even the appearance of impropriety in government procurements. FAR 3.101-1. 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. 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 disqualified based on the appearance of an unfair competitive advantage, as long as the determination is based on facts and not suspicion or innuendo. *TeleCommunication Sys. Inc., supra; Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28 n.15. Whether an appearance of impropriety based on an alleged unfair competitive advantage exists

⁶ Raytheon also contends that the contracting officer's analysis is undermined by "the multiple declarations by Raytheon program managers and [X] himself regarding the status of the Raytheon design, when X joined Raytheon," referring to the firm's contention that "it had finalized its DBD design for the DET phase long before [X] joined Raytheon in April 2020." Protest at 16, 35. In the same vein, Raytheon refers to the declarations representations of "the fact that they never asked [X] for any non-public or proprietary data that was current and competitively useful, and further that [X] never offered such data or indicated he had such data." *Id.* at 35-36.

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 an appearance of impropriety is a legitimate reason to eliminate a potential offeror from competition. *Serco Inc.*, *supra* at 12. Our Office will not substitute our judgment for that of the agency unless the decision is shown to be unreasonable. *Science Applications Int'l Corp.*, B-419961.3, B-419961.4, Feb. 10, 2022, 2022 CPD ¶ 59 at 6-7.

Here, the contracting officer reasonably noted, among other things, that there is no evidence of formal firewalling procedures or other contemporaneously documented actions that Raytheon took to limit the scope of X's input to Raytheon's proposal in any manner. To the contrary, the contracting officer's investigation found:

[N]ot only did Raytheon hire [X], Raytheon put him to work on its own DBD program for one year, including work on its DBD EMD competitive proposal, rather than make any reasonable attempt to avoid or mitigate the conflict of interest, such as placing him in a different corporate division from DBD or firewalling him from the DBD team. Indeed, far from being firewalled, as an employee of Raytheon [X] even represented and communicated back to the Government to influence the DBD EMD competitive requirement.

AR, Exh. A, D&F at 49-50. Raytheon criticizes the contracting officer's determination, in part, for not exclusively relying on "hard facts," as the protester views it. Comments at 3, 7-8 (asserting that the Navy's analysis "is not based on hard facts . . . much less hard evidence"). In this regard, the protester essentially argues that the contracting officer should have scoured the record for a "smoking gun." However, "hard facts" can--and, here, do--include evidence of information access and participation in prior work. *Health Net Fed. Servs., LLC*, *supra* at 34-35 (sustaining protest based on awardee's employment of a former government employee based on the individual's access to information); *see also CACI, Inc.-Fed. v. United States*, No. 23-324C, ___ Fed. Cl. ___, 2023 WL 4624485, at *15-16 (Fed. Cl. July 20, 2023). In this context, 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.*, *supra*.

Based on our review of the record, we find no basis to question the reasonableness of the agency's decision. The record demonstrates the bases for the contracting officer's determination that X was involved in Raytheon's DBD EMD effort. AR, Exh. A, D&F at 21-22. Indeed, despite Raytheon's characterization that X's work on the DBD EMD proposal effort was "limited" and "not significant," and the firm's denial that X "provide[d] any input whatsoever into Raytheon's DBD EMD technical offering," the protester concedes that X did support Raytheon's DBD EMD proposal effort. Protest at 18-19, 47 (acknowledging that, among other things, X "was an addressee on Raytheon's internal distribution for DBD related messages, including DBD EMD," attended "the DBD EMD Pre-Solicitation Conference on behalf of Raytheon," and "provided minor support" in a

meeting “with Raytheon’s proposal team during the summer of 2020 to explain how the DBD worked and the related key requirements.”).

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, Raytheon 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.

Raytheon Employment

The protester also contends that, to the extent the contracting officer’s conclusions are based on the circumstances of X’s recruitment, hiring, and employment by Raytheon, they are also unreasonable. Protest at 32-33. Raytheon asserts that, in its response to the contracting officer’s notice of potential exclusion from the competition in December 2022, the firm reasonably explained how Raytheon and X took all appropriate steps in Raytheon’s recruitment, hiring, and employment of X such that there was nothing “improper about the way that [X] left the Government and joined Raytheon.” *Id.*

For example, Raytheon identifies that X represented in declarations “that at the time he contacted Raytheon regarding potential employment in November 2019, he was not working on anything related to Raytheon.” Protest at 44. We find nothing unreasonable about the contracting officer’s conclusion to the contrary, where the contracting officer identified specific emails and other evidence documenting X’s work on the DBD program after November 2019. See AR, Exh. A, D&F at 12. This includes, for example, emails preparing for the Naval Aviation Requirements Group (NARG), “an event where Fleet operators relay top priorities to program offices for requirements development and acquisition planning,” specific to the DBD.⁷ *Id.*

The protester also relies on the post-government employment opinion letter that X requested and received from the NAVAIR Office of General Counsel. Protest at 45-46. Raytheon insists that the letter, “imposed no restriction related to the DBD program (either DET or EMD)” and must “be given weight.” *Id.* As the agency responds, however, the opinion letter was based on the information that X provided to the NAVAIR Office of General Counsel, and X did not identify that he had any role on the DBD when

⁷ In this regard, the contracting officer specifically found, among other things, X “provided several recommendations for what needed to be addressed at the NARG, including a discussion on DBD requirements, how to prioritize DBD requirements, planning test events, and future design reviews. . . . [X] further offered his insight and lessons learned from previous platform requirements, the difficulties faced with those platforms, and how they relate to DBD.” AR, Exh. A, D&F at 12.

requesting the opinion letter. COS/MOL at 12-13. To the extent that X failed to disclose relevant information on which the opinion letter was based, we find nothing objectionable with the relative “weight” given to the opinion letter by the contracting officer in his analysis. In short, we agree that the contracting officer identified a reasonable basis for concluding that there was, at minimum, the appearance of impropriety resulting from Raytheon’s hiring of X.⁸

Undue Delay

Additionally, in challenging the agency’s determination to exclude Raytheon from the DBD EMD procurement, Raytheon argues that the agency “has taken an unreasonable amount of time identifying and investigating issues associated with [X],” asserting that the contracting officer failed to comply with the provisions of FAR section 9.504, which directs contracting officers to identify and evaluate conflicts of interest “as early in the acquisition process as possible.” Protest at 47-48; Comments at 62-64. More specifically, Raytheon complains that the Navy knew X was supporting Raytheon’s DBD DET program “as early as May 27, 2020,” but did not notify Raytheon of any concerns about DBD EMD until August 2022 and did not make a final determination until April 2023, resulting in Raytheon wasting money and effort in pursuing the contract and being “deprived of the opportunity to mitigate the issue.” See Protest at 47. According to Raytheon, this delay “impact[ed] Raytheon’s due process rights.” *Id.* at 48.

The agency denies that its inquiry was delayed, assigning any blame for the timing of the start of the inquiry to Raytheon, which did not coordinate with the Navy regarding any potential conflict of interest until prompted by the Navy. COS/MOL at 56. As the agency points out, Raytheon was aware there was a potential conflict issue for DBD

⁸ Raytheon asserts in the alternative, in essence, that even if Raytheon’s hiring of X involved a violation of some post-government employment restriction, such a violation does not establish a conflict of interest, and instead carries separate consequences and cannot by itself justify the exclusion of an offeror from the competition. See Comments at 47. Our review of the record finds no support for Raytheon’s contention that the contracting officer was “fixated on what the [contracting officer] sees as a potential violation of . . . the post-employment restrictions of 18 U.S.C. sect. 207(c).” See *id.* To the contrary, the contracting officer’s analysis includes, but is not limited to, an assessment of post-government employment restrictions. See AR, Exh. A, D&F at 51. This is consistent with our Office’s practice of considering “all relevant information” to resolve a protest regarding the reasonableness of the agency’s disqualification of a firm based on an unfair competitive advantage through its hiring of a former government official. The contracting officer’s consideration of post-government employment restrictions is also consistent with our Office’s position that “[t]he provision at 18 U.S.C. § 207(c) is a criminal statute, the interpretation and enforcement of which are primarily matters for the *procuring agency* and the Department of Justice.” See *Dewberry Crawford Grp.; Partner 4 Recovery, B-415940.11 et al.*, July 2, 2018, 2018 CPD ¶ 298 at 23 n.12 (emphasis added).

EMD surrounding the firm's hiring and employment of X as early as April 2020, when BAE Systems sent a "Letter of Concern" to Raytheon about the hiring of X because of X's work "on a number of programs," including DBD.⁹ *Id.* In addition, the agency defends the length of the investigation itself as "thorough and diligent" and necessary to document the contracting officer's determination and recommendation. *Id.* at 55.

Based on our review of the record, we reject Raytheon's assertion that the agency unduly delayed its determination to exclude Raytheon. To the contrary, the record reflects that, upon identification of a potential conflict of interest by the government in August 2022--a potential conflict that Raytheon, itself, was aware of as early as April 2020--the contracting officer immediately embarked on a substantial and thorough investigation that involved written communications and interviews with multiple personnel. This comprehensive investigation included (1) the consideration of input from multiple sources, including Raytheon's and BAE Systems' responses to requests for information in September and October 2022; (2) the analysis and further investigation based on the information received and statements taken; and (3) the documentation of the contracting officer's findings and determination in April 2023. On the record here, we find no basis to question the timing of the agency's decision to exclude Raytheon. See *CACI, Inc.-Fed.*, *supra* at 14. As a consequence of finding no undue delay in the agency's investigation, we have no basis to consider Raytheon's contention that the undue delay impacted the protester's "due process rights."

Sole-Source Award

Finally, the protester asserts that the contracting officer's decision was flawed because the agency failed to consider "the impact on the public trust" of its decision to eliminate Raytheon from the competition based on "an 'apparent' impropriety" that will allegedly result in "the implementation of a sole source contract." 1st Supp. Protest at 3-5. Raytheon alleges that the agency cannot "sole source the DBD EMD contract" because it was the agency's "lack of advance planning" that led the agency to belatedly exclude Raytheon. *Id.* at 6-7.

The agency denies that it has "created a sole source situation," because the DBD EMD procurement was a full and open competition, and it was not transformed into a sole-source procurement merely because the agency's elimination of Raytheon resulted in a

⁹ The letter of concern identified that BAE Systems had recently learned that X would be working for Raytheon, and that "[d]uring his tenure with the NAVAIR, [X] has worked extensively with BAE Systems on a number of programs including ALE-55, Dual Band Decoy, and the Joint Strike Fighter." AR, Exh. A-16, Letter of Concern. According to BAE Systems, as a result, X had "in depth insight into BAE Systems' technical solutions and intellectual property, including trade secrets and inventions," necessitating "proper practices to ensure protocols after the hiring a former Government employee are met." *Id.* Neither BAE Systems nor Raytheon contacted the Navy about this letter of concern, and its existence only came to light through the contracting officer's investigation. See AR, Exh. A, D&F at 14.

single remaining offeror--BAE Systems. Supp. COS/MOL at 4-6. We agree. Here, the agency's reasonable exclusion of a competitor does not transform the nature of this full and open competition. Nor does it impose a heightened requirement on the agency to justify its exclusion of a competitor after reasonably determining the firm's actions had created, at minimum, an appearance of impropriety and a conflict of interest. Cf. *Persistent & Determinant Techs. LLC*, B-408342, Aug. 22, 2013, 2013 CPD ¶ 198 at 3 (rejecting argument that specifications resulted in agency "conducting a sole-source procurement"); see also *CACI, Inc.-Fed. v. United States*, *supra* at 15-16 (rejecting a similar argument where a protester did "not explain how the exclusion of one competitor for a conflict of interest forestalls competition"). Indeed, we find Raytheon's citation to FAR Section 3.101-1 in support of this argument surprising, given that it is the very section that mandates that the agency "avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships," justifying the exclusion of a firm like Raytheon for the exact scenario at issue here. As such, we see no merit to this argument.

The protest is denied.

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