

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Considering Using a Former Government Employee to Help Prepare Your Proposal? Recent Government Accountability Office Protest Decision Suggests Caution

*By Marcia G. Madsen and Evan C. Williams\**

*The authors explain that federal contractors should take note of a recent decision by the Government Accountability Office (GAO) that serves as an example of the GAO's willingness to question an agency's determination and recommend that an awardee be disqualified from a competition.*

Federal contractors often consider involving former government officials employed by the company when pursuing new and emerging procurement opportunities. Such “capture” efforts can be, and often are, a viable way to boost the chances of ultimately securing the contract. A recent bid protest decision, however, shows that using former government employees to aid proposal preparation can endanger the subsequent award.

The Government Accountability Office (GAO) recently published a reconsideration decision upholding its prior decision in *Serco, Inc.* in which GAO sustained a protest, finding that the awardee gained an unfair competitive advantage by using information provided by former high-level agency officials.<sup>1</sup> As discussed below, federal contractors should take note of this decision as it serves as an example of GAO's willingness to question an agency's determination and recommend that an awardee be disqualified from a competition.

## UNDERLYING PROTEST

The underlying protest involved the Navy's award of a task order to Booz Allen Hamilton, Inc. (BAH) for professional support services for the Deputy Command for Surface Warfare (SEA 21). The task order at issue was a follow-on procurement to a professional services contract performed by Serco.

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<sup>1</sup> Booz Allen Hamilton, Inc.—Recon., B-419617.4, Aug. 25, 2022, 2022 CPD ¶ 225; Serco, Inc. B-419617.2, B-419617.3, Dec. 6, 2021, 2021 CPD ¶ 382.

Upon receiving notice that the task order was awarded to BAH, the incumbent, Serco, filed a protest with GAO. Relevant to the reconsideration decision, Serco argued that BAH had an improper competitive advantage as a result of the firm employing two recently hired Navy captains who had been program managers for two of the program offices in SEA 21.<sup>2</sup> The GAO dismissed Serco's initial protest based on the Navy's representation that the contracting officer would take corrective action.

Specifically, the Navy stated that it would investigate whether the former Navy officers in question had access to non-public, competitively useful information that resulted in an unfair competitive advantage for BAH.<sup>3</sup> After completing their investigation, the contracting officer concluded that BAH did not obtain a competitive advantage and affirmed its award decision.

Serco then filed a post-corrective action protest that was sustained by GAO because the Navy lacked a reasonable basis for its determination that the information to which the two former Navy officers had access, and/or the information that was provided to BAH by former agency personnel, did not constitute non-public, competitively useful information.<sup>4</sup>

In reaching this conclusion, GAO found that the Navy's determination was not reasonably supported by the record and that "BAH obtained an unfair competitive advantage in preparation of its successful proposal. . . ."<sup>5</sup>

As a remedy, GAO recommended that the agency either disqualify BAH's proposal or, alternatively, initiate actions to avoid, neutralize, or mitigate the potential impact of the disclosed information and seek revised proposals.

## GAO'S RECONSIDERATION DECISION

On reconsideration, BAH requested reversal of the underlying decision, alleging it contained a number of errors of law and fact.<sup>6</sup> BAH asserted that GAO used the incorrect legal standard by failing to give the required deference to the contracting officer's determination related to whether a competitive advantage exists. According to BAH, "the presumption of an unfair competitive

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<sup>2</sup> Consistent with its general practice, GAO did not disclose the names of the two Navy captains but referred to them using pseudonyms in both the underlying and reconsideration decisions.

<sup>3</sup> Serco, Inc., B-419617, Mar. 29, 2021 (unpublished decision).

<sup>4</sup> Serco, Inc., B-419617.2, B-419617.3, Dec. 6, 2021, 2021 CPD ¶ 382 at 13.

<sup>5</sup> *Id.* at 15.

<sup>6</sup> This article does not address every allegation of error in BAH's request for reconsideration.

advantage applies only where the agency did not meaningfully investigate the matter.”<sup>7</sup>

Acknowledging that the identification of an unfair competitive advantage is a fact-specific inquiry that requires the exercise of considerable discretion, GAO noted “there is no requirement for deference to a contracting officer’s decision solely because the contracting officer has considered the facts surrounding the allegations of unfair competitive disadvantage, as BAH seems to contend.”<sup>8</sup> GAO then described the applicable standard of deference:

Rather, in reviewing the contracting officer’s analysis and conclusion, we will look at the reasonableness of the underlying basis for the conclusion, including whether certain information is competitively useful and whether the agency’s conclusions are supported by the record. *See, e.g., AT&T Government Solutions, Inc.*, B-413012, B-413012.2, July 28, 2016, 2016 CPD ¶ 237 at 11 (review of contracting officer’s conclusion that access to proprietary information would only be manifested by comparison to incumbent proposal).

Having described the relevant standard, GAO explained that the contracting officer’s determination was set aside because it was contradicted by certain facts in the record.

For example, while one of the former Navy officers claimed not to be involved in oversight of Serco, the record showed that this individual advised BAH’s proposal preparation team about particular aspects of Serco’s incumbent contract performance.

GAO concluded that BAH’s disagreement did not demonstrate that the wrong legal standard was applied but, instead, that BAH merely disagreed about the application of the legal standard to the facts.<sup>9</sup>

Additionally, BAH alleged that GAO’s decision was based on several interrelated factual and legal errors. In its reconsideration decision, GAO found that none of these allegations identified an error of material fact that would warrant reversing the decision.<sup>10</sup>

## TAKEAWAYS

### GAO Has a Highly Deferential Standard of Review of Its Decisions

As an initial matter, it is important to remember that we are discussing a reconsideration decision issued by GAO. Under GAO’s Bid Protest Regula-

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<sup>7</sup> Booz Allen Hamilton, Inc.—Recon., B-419617.4, Aug. 25, 2022, at 6–7.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 11.

tions, to obtain reconsideration, the requesting party must set out the factual and legal grounds on which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered.<sup>11</sup>

Thus, it is a good reminder of GAO’s highly deferential standard of review of its own decisions.<sup>12</sup>

### **Conflicts of Interest, Even the Appearance of, Must Be Avoided**

In terms of substance, GAO’s reconsideration decision reinforces two important legal principles related to conflicts of interest.

First, citing the requirements of FAR subparts 9.5 and 3.1 (prohibiting conflicts of interest in the government’s procurements),<sup>13</sup> GAO confirms that agencies must “avoid strictly any conflict of interest or *even the appearance of a conflict of interest* in government-contractor relationships.”<sup>14</sup>

Second, GAO reaffirmed the general rule that “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.”<sup>15</sup>

### **GAO Will Second-Guess an Agency’s Determination on Appearance of Conflict of Interest**

Also significant, GAO’s decision showed willingness to second-guess an agency’s determination regarding an appearance of a conflict of interest even where that determination was based on a consideration of all of the relevant facts.

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<sup>11</sup> 4 C.F.R. § 21.14(a).

<sup>12</sup> See also U.S. Gov’t Accountability Office, GAO-18-510SP, Bid Protests at the GAO: A Descriptive Guide (10th Ed. 2018), at 30 (“It is generally GAO’s practice to assign a different attorney to decide the request for reconsideration.”).

<sup>13</sup> In a footnote, GAO stated its view 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. Booz Allen Hamilton, Inc.—Recon., B-419617.4, Aug. 25, 2022, at 3 n.3.

<sup>14</sup> Booz Allen Hamilton, Inc.—Recon., B-419617.4, Aug. 25, 2022, at 3 (emphasis added).

<sup>15</sup> Booz Allen Hamilton, Inc.—Recon., B-419617.4, Aug. 25, 2022, at 3 (citing Health Net Federal Services., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28; NKF Engineering, Inc. v. U.S., 805 F.2d 372 (Fed. Cir. 1986)).

Rejecting BAH's allegation that GAO committed legal error by not giving due deference to the agency, GAO reiterated that it will look at the reasonableness of the underlying basis for the contracting officer's conclusion, "including whether certain information is competitively useful and whether the agency's conclusions are supported by the record."<sup>16</sup>

### **Contradicting Evidence Matters**

At the same time, it is doubtful that this decision, alone, represents a newfound inclination of GAO to question contracting officer determinations in the context of conflicts of interest. Rather, this case appears to have turned on the specific facts presented.<sup>17</sup> In this vein, it appears that a significant factor in GAO's reasoning was the existence of evidence in the record that contradicted the underlying bases of the contracting officer's conclusion.

### **Remedies May Be Harsh**

As a final takeaway, offerors should note the potential for a harsh remedy in such situations. Here, one of GAO's recommendations to the agency was to disqualify the awardee's proposal. As a result, when developing a strategy to capture a federal contract, offerors should consider limiting the involvement of certain former federal employees.

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<sup>16</sup> Booz Allen Hamilton, Inc.—Recon., B-419617.4, Aug. 25, 2022, at 7.

<sup>17</sup> *Id.* ("Our prior decision made a judgment based on the totality of the facts presented.").