

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Protesters Carry Heavy Burden to Show Unfair Advantage for Awardees With Ex-Government Employees, Government Accountability Office Decides

*By Marcia G. Madsen, Evan C. Williams and Cameron R. Edlefsen\**

*In this article, the authors discuss a recent decision by the Government Accountability Office that provided valuable insight into how it analyzes organizational conflict of interest allegations involving the hiring of former government employees and how heavy a burden protesters carry.*

The Government Accountability Office (GAO) has published a decision, *Cybermedia Technologies, Inc.*,<sup>1</sup> denying a protest alleging that an awardee had an organizational conflict of interest (OCI) resulting from its subcontractor's hiring of five former agency officials.

As discussed below, in denying Cybermedia's protest, the GAO provided valuable insight into how it analyzes OCI allegations involving the hiring of former government employees and how heavy a burden protesters carry.

## BACKGROUND

Companies seeking federal contracts or orders must take care when hiring former government employees, especially when those new hires will be involved in preparing a proposal. Over the years, GAO has considered countless protests involving OCI allegations. Cybermedia's protest involved the issuance of a task order by the Department of Defense's Defense Counterintelligence and Security Agency (DCSA) for industrial security support services at Quantico, Virginia, and at DCSA regional and field offices nationwide. The task order was issued under the General Services Administration (GSA) One Acquisition Solution for

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<sup>1</sup> *Cybermedia Technologies, Inc.*, B-420881, B-420881.2, Oct. 14, 2022, 2022 CPD ¶ 259.

Integrated Services (OASIS) procurement vehicle. The task order solicitation described the scope of work as including services such as program management, identifying risks to cleared facilities, and supporting senior agency leadership.

In response to the task order solicitation, which was posted on GSA's e-Buy portal<sup>2</sup> to small businesses holding an OASIS contract, the agency received two proposals, one from Cybermedia Technologies, Inc., and one from The Prospective Group, Inc. Based on its evaluation of the proposals, the agency determined that Prospective's proposal represented the best value because it was higher-rated under the technical approach factor and offered a lower price.

## THE PROTEST

After receiving notice of the agency's award decision and a debriefing, Cybermedia filed a protest with GAO.<sup>3</sup> In its protest, Cybermedia argued that DCSA failed to assess and mitigate an OCI arising from the awardee's principal subcontractor that hired five former agency officials, including the DCSA deputy director and the chief of staff at the agency's threat directorate.<sup>4</sup>

As support, Cybermedia asserted that the roles of those five individuals provided the awardee, Prospective, access to sensitive source selection information or other competitively useful information.

Thus, according to Cybermedia, the awardee gained an unfair competitive advantage that the agency should have investigated and addressed.

Responding to the protest, DCSA argued that Cybermedia failed to show that any of the five individuals had competitively useful information.

In this regard, DCSA asserted that four of the five individuals left the agency before November 2020, when the initial planning of this solicitation began.

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<sup>2</sup> The GSA e-Buy system is an online tool designed to facilitate the submission of quotations for various commercial goods and services under GSA schedules and technology contracts. See FAR 8.402(d); see also <https://www.gsa.gov/tools/supply-procurement-etools/ebuy>.

<sup>3</sup> As to jurisdiction, GAO stated that "the applicable statutory jurisdiction to hear protests challenging the issuance of a task or delivery order depends on the agency that awarded the underlying IDIQ contract, rather than the agency placing the order." Cybermedia at 2 n.2 (citing *Vysnova Partners, Inc., B-420654 et al.*, July 7, 2022, 2022 CPD ¶ 177 at 3 n.2). Noting the OASIS IDIQ contracts were issued by the GSA and the value of the task order at issue exceeded \$10 million, GAO found that "[t]his protest falls within our statutory jurisdiction to hear protests in connection with task and delivery orders valued in excess of \$10 million that are issued under civilian agency multiple-award IDIQ contracts." *Id.* (citing 41 U.S.C. § 4106(f); 4 C.F.R. § 21.5(l)).

<sup>4</sup> While the protester also raised an allegation related to the agency's pricing evaluation, this article concentrates on GAO's resolution of the OCI issue.

As to the fifth person (the agency's former chief of staff), the agency noted this individual was hired by Prospective's subcontractor in April 2022, which was after proposals were submitted.

The agency further noted that none of these individuals were identified in Prospective's proposal as part of the contract workforce.<sup>5</sup>

## GAO'S ANALYSIS

Before delving into its analysis of this issue, GAO explained that it has "cautioned that contracting agencies must avoid even the appearance of impropriety in government procurements, and that a firm competing for a contracting opportunity may gain an unfair advantage through its hiring of a former government official, which can therefore be a basis to disqualify the firm from the competition."<sup>6</sup> GAO then highlighted the protester's burden of proof in such situations:

However, we have noted that non-speculative "hard facts" must be present to show there was an unfair advantage, even if they do not show an actual impropriety. These would include whether the individual had access to non-public information that was not otherwise available to other firms, or to non-public proprietary information about other firms, and whether that non-public information was competitively useful. *VSE Corp.*, B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 at 7.

Based on the record before it, GAO found that "the protester has furnished only unfounded suspicions about unspecified proprietary and 'other' information."<sup>7</sup> GAO further found: "We see no error in the contracting officer's decision not to investigate the alleged organizational conflict of interest based on Cybermedia's suspicions, particularly where the individuals had not been involved in any aspect of this procurement."

Of note, the protester also lodged an overarching allegation that Prospective's employment of five former senior agency staff over a three-year period threatened procurement integrity and was "simply too much for any reasonable contracting officer" to permit.<sup>8</sup> Rejecting this broad contention, GAO explained that, "[t]o the contrary, the fact that a competitor employs multiple

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<sup>5</sup> During the development of the protest, Prospective represented to GAO that none of the challenged individuals participated in preparation of the proposal submitted to the agency.

<sup>6</sup> *Cybermedia Technologies, Inc.*, B-420881, B-420881.2, Oct. 14, 2022, at 8.

<sup>7</sup> *Id.* at 9.

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

former agency officials does not show unfair competitive advantage by itself, nor is the fact that those individuals possessed familiarity with the type of work reflects evidence of an unfair competitive advantage.”<sup>9</sup> GAO ended the decision with the following summary of its conclusion:

In sum, Cybermedia has not provided a basis to question the agency’s conduct of the procurement because it has not shown that any of the individuals could have had competitively useful information. Lacking any facts to support the assertion of a conflict of interest, we see no basis to question DOD’s conduct of the procurement.

In denying the protest, GAO affirmed the agency’s decision not to investigate the OCI and allowed the procurement to proceed.

### TAKEAWAYS

First, the *Cybermedia* decision is notable because it reaffirms a protester’s burden of proof in OCI cases. That is, GAO confirmed that a protester bears a heavy burden to establish that an awardee received an unfair competitive advantage by hiring former agency officials. In particular, GAO faulted Cybermedia for failing to provide “hard facts” that the former agency officials in question had access to non-public competitively useful information. On this point, GAO explained that the protester “furnished only unfounded suspicions about unspecified proprietary and ‘other’ information” and that “[i]n no case does Cybermedia identify specific information that an individual could have known that could credibly provide any unfair competitive advantage.”<sup>10</sup>

Another important lesson from the *Cybermedia* decision is that the resolution of OCI allegations will turn heavily on the facts before GAO. For example, GAO recently issued a reconsideration decision finding that the awardee gained an unfair competitive advantage by using information provided by former high-level agency officials.<sup>11</sup>

In the *Booz Allen Hamilton* (BAH) reconsideration, GAO pointed out that while one of the former government employees claimed not to be involved in oversight of the protester, the record showed that this individual advised the awardee’s proposal preparation team about particular aspects of the protester’s incumbent contract performance.<sup>12</sup>

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<sup>9</sup> *Id.* at 9–10.

<sup>10</sup> *Id.* at 9.

<sup>11</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.

<sup>12</sup> Booz Allen Hamilton, Inc.—Recon., B-419617.4, Aug. 25, 2022, 2022 CPD ¶ 225, at 7.

Conversely, in *Cybermedia*, GAO found that neither the protester's allegations nor the evidence in the record provided a basis to conclude that any of the individuals in question had access to non-public competitively useful information. Finding a lack of factual support for Cybermedia's allegation that the awardee received an unfair competitive advantage, GAO denied the protest.

Another takeaway is that both agencies and contractors should be mindful that GAO has wide discretion when resolving allegations that an awardee gained a unfair competitive advantage.

In *Cybermedia*, GAO found no error in the contracting officer's decision not to investigate the alleged OCI allegations based on the insufficiency of the protester's suspicions.

In the *BAH* reconsideration decision, however, GAO set-aside an agency's conclusion that there was no appearance of an unfair competitive advantage even though that determination was based on a formal OCI investigation and consideration of all of the relevant facts.

So, on the one hand, GAO may excuse an agency's refusal to conduct an OCI investigation if it finds the underlying protest allegations deficient on their face.

And, on the other hand, GAO may second-guess an agency's conclusion as to the existence of an OCI even when the agency conducts an OCI investigation.

Thus, it appears that whether or not the agency conducts an OCI investigation, GAO will examine the evidence presented to determine if, in its view, the record shows the awardee received an unfair competitive advantage due to access to non-public competitively useful information.

That said, government contracts practitioners should continue to monitor this area of GAO's case law for further insights.