

## GAO Reminds Contractors to Exercise Caution When Hiring Former Government Officials

Litigation Alert

**12.28.2021**

Earlier this month, the U.S. Government Accountability Office (GAO) sustained the protest of a \$371.9 million Department of the Navy professional support task order, finding that the awardee's hiring and use of former Navy captains during proposal preparations compromised the integrity of the procurement. The decision in *Serco Inc.*, B-419617.2; B-419617.3 (Dec. 6, 2021) serves as a reminder to contractors to carefully consider the hiring of former government officials and illustrates the type of support former officials can and cannot provide during bid proposal efforts.

### Background

In July 2019, the Navy released a request for proposals (RFP) for professional support services for the SEA 21 program, comprised of four program offices that manage the lifecycle maintenance and modernization of non-nuclear naval surface ships. The contemplated contract was a follow-on to a contract awarded to Serco in 2014. Relevant to the protest, Navy Captains John Jones and Sam Smith served as program managers (PMs) for two of the four program offices during the incumbent contract.<sup>1</sup> As part of its responsibilities, Serco submitted monthly reports documenting various aspects of its performance, including labor rates, names of employees, and hours worked for each employee. The reports also detailed "significant achievements" and "problem areas encountered and anticipated" by Serco. Jones and Smith had access to these reports as part of their roles as PM. Serco and the PMs also participated in weekly meeting to discuss the contractor's performance.

Booz Allen Hamilton (BAH) began proposal efforts on the SEA 21 follow-on RFP in 2018, including executing teaming agreements with several small businesses to support proposal preparations. Both Mr. Jones and Mr. Smith left the Navy in 2018 and were subsequently hired by BAH's subcontractors. Each provided extensive support to BAH during the proposal process — for example, Jones disclosed Serco's performance issues and Smith provided insights about solicitation requirements and key personnel availability.

Serco and BAH were the only offerors on the SEA 21 follow-on RFP. On February 5, 2021, the Navy awarded the contract to BAH, finding their proposal to represent the best value to the government. Each offeror had the same ratings under the three evaluation factors, but the Navy found BAH to have a superior technical and management approach. Moreover, BAH's total evaluated cost/price was \$371.9M, while Serco's was \$428M.

On February 23, Serco filed a protest challenging the integrity of the source selection process, asserting that the agency had failed to reasonably consider the unfair competitive advantage obtained by BAH through its access to, and use of, non-public, competitively useful information, namely through the hiring of the two former Navy captains. GAO dismissed the protest once the Navy stated it would take corrective action. However, the Navy's subsequent investigation found "no evidence that current or former government employees provided BAH with unequal access to non-public, competitively useful information that would have provided it with an unfair competitive advantage." This protest by Serco ensued.

### Summary of Decision

GAO agreed with Serco's concerns, finding that the Navy's selection of BAH's proposal for award was materially flawed because the hiring of recently retired agency personnel compromised the integrity of the procurement pursuant to Federal Acquisition Regulation (FAR) requirements.

First, GAO found that Jones and Smith had "virtually unlimited access to Serco's detailed information regarding prior costs

(including burdened and unburdened labor rates), staffing, technical approach, and past performance." GAO rejected the Navy's assertions that the information Jones and Smith had did not constitute non-public, competitively useful information.

Second, GAO held that it "cannot be meaningfully disputed" that the two former officials were recruited and hired shortly after leaving Navy employment by BAH's subcontractors with the express purpose of assisting in BAH's proposal efforts. Moreover, the record established that Jones and Smith engaged in "comprehensive proposal preparation activities" and that neither BAH nor its subcontractors "placed limitations on the scope of the information they provided."

Third, GAO noted that the Navy's investigation relied heavily on the assertions made by the two former PMs regarding the scope of their Serco knowledge and participation in BAH's proposal activities. However, GAO concluded that their representations were in direct conflict with the documents provided in the record. Numerous examples were cited, such as Jones asserting that he "did not see information about Serco's labor rates" during his time as PM. However, emails produced showed requests addressed to Jones asking him to concur on hiring specific Serco personnel at specific rates.

Based on these findings, GAO rejected the Navy's investigation and its finding that there was no evidence of unfair competitive advantage arising out of the hiring of Jones and Smith as unreasonable. Instead, BAH had "access to information that was not public and was competitively useful." GAO recommended the Navy either (1) disqualify BAH's proposal altogether or (2) take steps to mitigate the impact of the information provided by Jones and Smith and seek revised proposals.

## Takeaways

There are several key takeaways from the *Serco* decision, including:

- **Contractors must look at the specific facts of their procurement** . GAO's decision is notably light on any legal discussion. Aside from a brief mention of the principles of FAR 3.1 and 9.5 which prohibit organizational conflicts of interest (OCI) in government procurements, the discussion centers almost exclusively around the specific facts of the procurement. Thus, when contractors analyze their own potential OCI issues, they need to pay particular attention to (1) the circumstances surrounding their procurement, (2) the role the hired official had while in government and how it relates to the procurement, (3) the type of information the hired official had access to, and (4) the activities the official will play in the proposal process and the information they will provide. Any inquiry by a contractor will be highly fact-specific.
- **Even the appearance of unfair competitive advantage can be disqualifying** . To the consternation of contractors, there are not many bright-line rules for what does and does not constitute an OCI. The broad language of FAR 3.101 reiterates that notion. It reads: "Government business shall be conducted in a manner above reproach...The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships." Thus, contractors must consider that the employment of former government officials, while not actually an OCI, may have the appearance of impropriety.
- **Recent access to competitively useful information may be dispositive** . GAO noted that when an offeror chooses to hire former government officials who have had recent access to competitively useful information, and uses those officials to assist in proposal efforts, GAO "will assume that the offeror benefited from the information." In doing so, GAO has provided one bright-line rule to contractors: do not hire former government officials if they have had recent access to competitively useful information. Or at the very least, place limitations on the official's involvement in the proposal process or the information they provide. Otherwise, a (successful) protest may not be far off.
- **The consequences of an OCI can be severe** . The *Serco* decision may lead to the elimination of BAH from the SEA 21 task order competition, given that GAO's first recommendation is to disqualify the contractor. Alternatively, GAO instructs the Navy to mitigate the unfair advantage Jones and Smith provided, which could be a difficult task. Thus, if the Navy does allow for revised proposals and BAH is awarded again, it seems likely another protest from Serco will follow.

If you have any questions about the *Serco* decision or the hiring and use of former government officials, please contact one of the Miller & Chevalier attorneys listed below.

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<sup>1</sup>GAO's decision uses the pseudonyms "Jones" and "Smith" to not disclose the names of specific individuals.

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