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Just Give Me The Facts: GAO Overturns Army Disqualification Of Awardee

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On November 21, 2011, GAO issued a rather surprising decision in which it overturned an agency's determination that an appearance of impropriety justified the termination of a contract award. Specifically, in *VSE Corp.*, B-404833, November 21, 2011, GAO rejected the Contracting Officer's determination that VSE's use of the former government Deputy Project Manager ("DPM") as a consultant to assist VSE in preparing its proposal created an appearance of impropriety that so tainted the procurement as to justify the termination of the contract.

The procurement sought support services for the Department of the Army's Rapid Equipping Force ("REF"). In May 2011, in a competition amongst seven offerors, VSE was awarded the contract, as the low-cost, technically acceptable offeror. CACI, one of the other offerors, filed an agency-level protest challenging the award on the basis that VSE had obtained an improper competitive advantage by virtue of the fact that it retained the Army's former DPM from the REF program to assist VSE in preparing its proposal.

Relying on ten findings, which the Contracting Officer denoted as "findings of fact," the Contracting Officer determined that VSE's hiring of the DPM "created an appearance of impropriety" in that he had "participated personally and substantially as a Government Officer in the preparation of the REF [Alternate] Staffing solicitation" and that his work as a consultant to VSE "created the appearance of a conflict of interest," and, thus, that there was an "appearance of impropriety" justifying the disqualification of VSE. Significantly, the Contracting Officer made these determinations notwithstanding that she could not "conclusively establish" either that the former government employee (1) "had access to competitively useful source selection information that he provided to VSE," or (2) "violated any procurement rules or regulations," and despite the fact that she was aware that the former government employee had been advised, in writing, by the Army ethics counselor "that he was not prohibited, under the post-employment restrictions applicable to government employees under 18 U.S.C. §207, from providing 'behind-the-scenes' activities on behalf of a contractor." The Contracting Officer terminated the award to

VSE, awarded the contract to the offeror next in line, General Dynamics Information Technology (and not CACI), and this protest by VSE followed.

GAO noted that disqualification based on an appearance of impropriety is proper without proof of an actual impropriety, but cautioned that "the determination of an unfair competitive advantage [must be] based on hard facts and not on mere innuendo or suspicion." Moreover, it held that "[a]n unfair competitive advantage is presumed to arise where an offeror possesses competitively useful non-public information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was actually utilized by the awardee." However, agreeing with the Federal Circuit's decision in *Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009), GAO held that the determination of the appearance of an impropriety must be based on "hard facts" and not "on mere inference or suspicion of an actual or potential conflict." GAO then examined each of the Contracting Officer's "findings of fact," and determined that they were largely based on incorrect assumptions and misunderstandings of the law.

With respect to the former DPM's activities prior to retirement, the Contracting Officer concluded that the DPM had "actively participated" in the development of the REF Solicitation and "acquisition strategy," including providing substantive comments on the draft. GAO found, however, that the Contracting Officer had *assumed* these facts based on her belief that the former DPM had overall responsibility for the Solicitation, attended a meeting about the Solicitation requirements, and reviewed a draft Statement of Work ("SOW"). The facts elicited during the GAO proceeding, including hearing testimony, however, showed that while the former DPM attended a meeting at which the REF requirements were discussed and was given a draft of the SOW to review, he had "minimal" involvement, his suggestions regarding the Solicitation had been rejected, the team in charge of the Solicitation did not report to him, and the draft SOW was provided to the public. GAO recognized that "a government employee's participation in the drafting of a SOW or performance work statement does not necessarily demonstrate that the employee's post-government work for an offeror created a conflict of interest where the employee's work was later released to the public as part of the solicitation." GAO concluded, therefore, that the facts put forth by the Contracting Officer did not establish that the DPM had access to any non-public, competitively useful information or gave rise to a conflict of interest or appearance of an impropriety.

The Contracting Officer had further *assumed* that since the DPM had provided input to the incumbent contractor's Award Fee Board, the DPM must have had access to the incumbent contractor's proprietary information. The DPM explained that he did not have access the incumbent's cost or price information, had only provided input for the elements of performance

on which he was involved, attended approximately four “round table discussions,” and did not have access to the final Award Fee determination. GAO found therefore, that the Contracting Officer's findings “relied on her assumptions, rather than hard facts,” and there also were no hard facts provided by the Agency during the protest to support the Contracting Officer's assumptions.

The only “hard fact” that GAO concluded the Contracting Officer could have determined was that the former DPM retained his government laptop until January 31, 2011, the end of the DPM's terminal leave, rather than in mid-December, when the former DPM stated that he returned the laptop. GAO found that since the former DPM's final “outprocessing” papers identified the return date as January 31, 2011, the Contracting Officer could rely on that documentation instead of the statements of the former DPM. GAO found that while the laptop theoretically *could have* provided the former DPM with access to a government-only files that *may have* contained procurement sensitive documentation, there was no evidence that such files were accessed or that such files contained procurement sensitive data. Therefore, this one fact was, in GAO's view, insufficient on which to base a finding of an appearance of impropriety.

GAO next turned to the Contracting Officer's findings with respect to the former DPM's post-employment activities. Here, the Contracting Officer had determined that the former DPM's consulting work for VSE constituted a “*per se*”violation of the criminal post-employment laws. The former DPM had acted as a consultant for VSE and in this capacity had reviewed its draft proposal and attended an internal VSE meeting. In this regard, as noted above, the former DPM had obtained an ethics opinion from the Army stating that it was permissible to provide “behind-the-scenes” work for a contractor. The Contracting Officer, while admitting that she did not understand what the ethic's opinion meant by “behind-the-scenes,” concluded that reviewing the draft proposal “constituted 'representing back'“ to the government and that participation in an internal VSE meeting was improper because it was “very public.” The Contracting Officer testified that “Behind-the-scenes. I don't know what he could do. I don't actually have a definition. 'Behind-the-scenes’ would mean maybe providing advice to one person, helping to write the proposal, not going forward into a meeting and stating I'm here, ask me questions.” GAO, of course, found that the Contracting Officer misunderstood the law and, thus, her determinations based on that misunderstanding were unreasonable.

Finally, GAO analyzed the Contracting Officer's determination that the former DPM's execution of a consulting and nondisclosure agreement with the Army established an appearance of impropriety. Here, the consulting and nondisclosure agreement was executed after both his retirement from the Government and the conclusion of his consulting work for VSE. Finding that the nondisclosure agreement was unrelated to the former DPM's work while a government

employee and “had nothing to do with any post-employment restriction,” GAO concluded that this could not support the Contracting Officer's appearance of impropriety determination.

Notwithstanding all of the above facts and conclusions, however, GAO declined to find that the former DPM's activities were “*per se* permissible or that they do not raise any legitimate concerns that his hiring by VSE as a consultant creates an appearance of impropriety.” Rather, in sustaining the protest, GAO merely recommended that the Army “conduct a new review of the former DPM's role in the procurement,” and make a new determination as to whether there are any “hard facts” to support a finding of an appearance of impropriety.

While some may argue this is a cop-out, such a recommendation follows GAO's general reluctance to recommend specific awards, which is consistent with its view that it will not substitute its judgment for that of the procuring agency. Hence, GAO sent it back to the agency either to develop a better rationale supporting the disqualification or to reinstate the award to VSE. We anxiously await the Army's next step.

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