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Bid Protests

Admission of Former Employees as Consultants under GAO Bid Protest Protective Orders

By Donald J. Carney

Tight deadlines apply to bid protests at GAO, including the admission of consultants under protective orders to provide technical, quantitative or other specialized knowledge useful to the litigation. GAO generally allows protesters to choose the assistance they deem necessary to pursue their bid protest, including consultants, unless the party opposing admission raises valid objections. GAO, however, has occasionally expressed its reluctance to admit a protesting party's former employee as a consultant, particularly where the consultant is unlikely to testify before GAO again in the future.

Nevertheless, GAO has admitted former employees as consultants, even where the former employee was previously involved (several years before the protest) in the protester's competitive decision-making. This article examines the standards that GAO applies in determining whether to admit consultants under its bid protest protective orders in this time-sensitive environment. It focuses on the gray area of whether a consultant's prior—as opposed to ongoing—involvement in a party's competitive decisionmaking is grounds for rejection of an application for admission under a protective order.

Donald J. Carney is a partner in the Washington, D.C. office of Perkins Coie. He focuses his practice on government contracts law.

GAO's Two-Part Test for Consultant Protective Order Applications. If it appears that a consultant is necessary, a protester (or intervenor) needs to move quickly for their admission. The consultant needs to be ready by the time the agency produces its report on the protest (due within 30 days of receiving notice of the protest filing). If the agency makes an early document production, the consultant may assist with the case even earlier by reviewing and analyzing relevant documents. Typically, a consultant's analytical work in a GAO protest is narrowly focused on demonstrating whether the agency's evaluation followed the solicitation's requirements or was reasonable. *See PCCP Constructors, JV; Bechtel Infrastructure Corp.*, B-405035 et al., Aug. 4, 2011, 2011 CPD ¶ 156, at 9-13[1] (civil engineer demonstrated that agency departed from Request for Proposal's (RFP's) requirements); *AAR Aircraft Serv.—Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 81, at 3-4 (aircraft performance consultant showed that an awardee could not satisfy the RFP's technical requirements).

[1] In a subsequent protest of the agency action implementing GAO's decision, the Court of Federal Claims agreed, based in part on expert testimony, that the agency took ''an approach to the technical evaluation in general that was inconsistent with the solicitation.'' *CBY Design Builders v. United States*, 105 Fed. Cl. 303, 350 (2012).

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Consultants must satisfy a two-part test for admission under a GAO protective order. First, a consultant must establish that he or she is not ''involved'' in competitive decisionmaking for any firm that could gain a competitive advantage from access to protected information. 4 C.F.R. § 21.4(c). Second, the applicant must establish that there is no significant risk of inadvertent disclosure of protected information from the applicant's admission. *Id.* Protected information can include proprietary or confidential contractor information, sensitive agency source-selection material, or other information that could result in a firm gaining a competitive advantage against competitors or at the procuring agency. *See* 4 C.F.R. § 21.4(a). Absent any special concern over the sensitivity of protected material or any reason to believe that the admission of an expert would pose an unacceptable risk of inadvertent disclosure, GAO maintains a ''strong policy in favor of permitting protestors to choose the assistance they deem necessary to pursue their protest.'' *Global Readiness Enterprises*, B-284714, May 30, 2000, 2000 CPD ¶ 97, at 2 n.1 (citing *Bendix Field Eng'rCorp.*, B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227, at 6-7).

The first prong of the two-part inquiry is a bright-line test derived from the Federal Circuit's decision in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984). In that case, the court identified an applicant's involvement in competitive decisionmaking as potentially disqualifying, defining it as follows:

> [A] counsel's activities, associations, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.

Id. at 1468 n.3. In *MatsushitaElec. Indus. Co. v. United States*, 929 F.2d 1577 (1991), the Federal Circuit subsequently confirmed that advice and participation in competitive decisionmaking is the test for determining whether an applicant's access under a protective order would pose an unacceptable risk. Pursuant to this reasoning, an applicant's ongoing involvement in competitive decisionmaking is generally fatal to an application for admission under a GAO protective order. *Allied Signal*, B-250822, B-250822.2, Feb. 19, 1993, 93-1 CPD ¶ 201, at 9-10.

Practice Tips

Consultants must satisfy a two-part test for admission under a GAO protective order:

- establish that he or she is not ''involved'' in competitive decisionmaking for any firm that could gain a competitive advantage from access to protected information, and;
- establish that there is no significant risk of inadvertent disclosure of protected information from the applicant's admission.

GAO's prescribed form for consultant applications requires applicants to certify—consistent with *U.S. Steel*, and at the risk of criminal penalties—that the applicant is ''not involved in competitive decisionmaking for or on behalf of any party to this protest or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order.'' GAO, Office of the General Counsel, *Guide to GAO Protective Orders* (June 2009) at 42, ¶ 3 (consultant application form). The applicant must also state that neither he nor his employer is engaged in the activities of competitive decisionmaking, such as providing advice concerning or participation in decisions about marketing or advertising strategies, product research and development, product design, or competitive structuring and composition of bids, offers, or proposals where the use of protected material could provide a competitive advantage. *Id.*

As to the second prong, GAO considers several factors to determine whether there is a significant risk of inadvertent disclosure from admitting the applicant, including GAO's desire for assistance in resolving the specific issues of the protest, the protester's need for consultants to pursue its protest adequately, the nature and sensitivity of the material sought to be protected, and whether there is opposition to an applicant expressing legitimate concerns that the admission of the applicant would pose an unacceptable risk of inadvertent disclosure. *See EER Sys. Corp.*, B-256383, et al., June 7, 1994, 94-1 CPD ¶ 354, at 9.

As part of the application process, GAO requires consultants to provide a resume and a list of all clients for whom (1) the consultant and (2) his employer have performed work in the two years prior to submitting the application (with, for the consultant's list, a description of the work performed). *Guide to GAO Protective Orders* (June 2009) at 43, ¶ 5. The application also includes two-year restrictions on future activities intended to protect future competition. First, the consultant must agree not to engage or assist in the preparation of a proposal to be submitted for the type of program at issue in the protest, where the consultant knows that a party to the protest or any successor entity will be a competitor, subcontractor or teaming member. *Id.* at ¶ 7. Second, the consultant must agree not to engage or assist in the preparation of a proposal for submission to the subject agency for the same type of program that is being protested. *Id.* The parties to the protest may agree to different or other (frequently, more onerous) future employment restrictions in order to protect especially sensitive information. *Id.* at 7.

GAO has rejected a consultant's application seeking to limit the restrictions to certain geographic locations. *Restoration & Closure Services, LLC*, B-295663.6 et al., Apr. 18, 2005, 2005 CPD ¶ 92, at 3-5. In that case, GAO noted that a consultant's refusal to agree to the standard protective order application for the ''subject matter involved in the protested procurement''—regardless of locale—meant that in the future he might ''very well perform proposal preparation assistance for this very type of work, even where a party to the protest may be a competitor, subcontractor, or teaming member.'' *Id.* at 4.

While counsel and consultants who are admitted under the protective order can use protected information in the pursuit of a protest at GAO, they must also safeguard this information. They cannot disclose it to anyone not admitted under the protective order, including their clients. *Guide to GAO Protective Orders* at 19-20 (model protective order).

Because GAO considers the proper functioning of the protective order essential to the bid protest process, it

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may sanction anyone who violates its terms. *PWC Logistics Services Company KSC(c)*, B-310559, Jan. 11, 2008, 2008 CPD ¶ 25, at 12. GAO has the inherent authority to dismiss the protest, prohibit an intervenor from participating in the remainder of the protest, refer the violation to bar associations (for counsel) or professional associations (for consultants) or other disciplinary bodies, and restrict the future practice of counsel or consultants before the GAO. 4 C.F.R. § 21.4(d); *Guide to GAO Protective Orders* at 22; *PWC Logistics Services,* 2008 CPD ¶ 25, at 12. In exercising this power, GAO has explained its concerns as follows:

> Private parties and agencies whose information, whether proprietary or source-selection-sensitive, is provided under the aegis of our protective orders need to have assurance that our Office will be vigilant in protecting that information, to the extent that we are able to do so.

Id. at 14. GAO has dismissed a protest where a protester received materials from counsel marked with a protective legend, but retained and further distributed the materials within the company. *Id.* Where a violation related only to counsel's conduct, and without the knowing participation of the protester, however, GAO has declined to dismiss a protest. *Waterfront Technologies, Inc. —Protest and Costs*, B-401948.16 et al., June 24, 2011, 2011 CPD ¶ 123.

GAO's Assessment of Risks Relating to a 'One Time' Former Employee Consultant's Involvement in Competitive Decisionmaking. While GAO maintains a bright-line rule that an application will not be approved where the applicant is involved in ongoing competitive decisionmaking, neither GAO's rules nor its protective order guidance expressly precludes a consultant applicant's admission based upon *prior* involvement in competitive decisionmaking. Nevertheless, GAO may reject an applicant who was formerly involved, if it believes that the extent or relevance of the prior involvement to the specific program at issue creates a heightened risk of inadvertent disclosure.

GAO has held that prior involvement in competitive decisionmaking does not automatically disqualify a consultant from admission. For example, GAO admitted a consultant under a protective order even though he was a former employee of the protester. *Sys.Research &Applications Corp.; Booz Allen Hamilton, Inc.*, B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28, at 11. In granting the consultant access in that case, GAO assessed that his admission ''did not pose more than a minimal risk of inadvertent disclosure'' because he left a position with the protester that would have been otherwise disqualifying ''several years ago'' and had no continuing financial interest in the protester. *Id.*

Counsel considering retaining a former employee of the client as a consultant in GAO proceedings face a dilemma. The former client employee may have expertise regarding technical or competitive issues in the protest—particularly if they previously worked on the specific program or project that is being protested—that would make them a particularly valuable consultant. At the same time, however, there may be significant risk that GAO may not admit the former employee competitive decision maker, although the exact standard for its determination is unclear. Specifically, it is unclear whether ''several years'' has to pass from when an employee leaves a position before he can be admitted under a protective order, or whether a shorter time may suffice, depending upon the nature of the former employee's involvement in competitive decisionmaking.

Several factors appear to drive GAO's concerns with former employees, as compared to professional consultants. First, GAO may be concerned regarding its ability to meaningfully police compliance with the protective order if neither the consultant nor his employer seems likely to testify again before GAO. Without that leverage—even where the applicants may agree to comprehensive and extended restrictions on their future involvement in proposals to the government—GAO may identify heightened risk.

Second, GAO may believe that a former employee who is not a professional consultant may be more prone to inadvertent mistakes in handling protected information, given such employee's lack of familiarity with GAO procedures. Third, GAO may be wary that the consultant has ongoing social or other ties to the company or may subsequently develop an interest in returning to the company or industry as a consultant given their expertise in the field, again heightening the risk of inadvertent disclosure.

In the author's experience, on a case-by-case basis, GAO lawyers have expressed concern that consultant candidates with prior experience in a party's competitive decisionmaking may not be good candidates for admission under the protective order—even where the applicants agree to comprehensive and extended restrictions on their future involvement in proposals to the government. The factors that GAO appears to consider important include (1) the recency of the involvement, (2) the depth of the involvement, and (3) the likelihood that the consultant will be concerned with protective order compliance because of the risk of sanctions for failing to comply. While GAO's form application for consultant admission requires the identification of clients for whom the candidate and his employer have performed work within the two years prior to the application, the consultant's resume provides GAO with information that likely provides an even longer time period for GAO's review. Consequently, the parameters that GAO will use to determine whether prior involvement in competitive decisionmaking is prohibitively recent is unclear.

The caselaw on this specific issue does not appear to be well-developed because GAO often signals its intent to deny a consultant's application before actually doing so. This allows consultants to withdraw their applications before GAO documents the basis for the denial. Given the volume of protests on GAO's docket and its resource constraints, GAO seems to be interested in winnowing down consultant candidates (particularly one-time, former or retired employee consultants) to both minimize the risk of inadvertent disclosure and reduce the likelihood of having to police compliance with protective orders after the completion of the protest. To the extent that GAO may have increasing concern over this issue, greater openness and guidance from GAO on these issues would contribute to greater efficiency in the litigation of bid protests.

Given the tight timelines in which protests proceed, counsel considering retaining a former client employee competitive decisionmaker as consultant are well advised to have backup candidates available for admission under the GAO protective order given the murkiness of the standard by which the candidates will be evaluated. Should GAO deny, or signal that it will deny, admission

to a consultant candidate, standby candidates posing less apparent risk as measured against the factors that GAO appears to consider should be available to fill the void.

Clarification Regarding Prior Consultant Involvement in Competitive Decisionmaking as a Risk Factor Would Promote Efficiency in Protests. As discussed above, GAO considers prior involvement in competitive decisionmaking as part of its analysis of the risk of inadvertent disclosure. GAO could foster greater efficiency by augmenting the guidance that it provides in the *Guide to GAO Protective Orders* regarding the admission of consultants. In particular, GAO should state its position regarding the relevance of an applicant's *prior* involvement in competitive decisionmaking, particularly in situations where the applicant does not seem likely to appear before GAO again.

This guidance would also provide better focus to parties when they identify appropriate applicants. Such clarification would reduce the burden upon parties involved in disputed applications and reduce the burden on GAO in dealing with consultant issues—thereby enhancing the efficiency of litigating protests before GAO. In any event, bid protest practitioners should be aware of GAO's concern in this area, even if it is not spelled out in GAO's rules, caselaw or guidance.

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