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## Decision

**Matter of:** VSE Corporation

**File:** B-404833.4

**Date:** November 21, 2011

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### DIGEST

Protest challenging the agency's termination of a contract awarded to the protester is sustained where the record does not support the contracting officer's determination that an appearance of impropriety had been created by the protester's hiring of a former government employee as a consultant, because the record shows that the determination was based on assumptions, rather than hard facts, and relied on an incorrect understanding of the statutes and regulations that apply to post-government employment activities.

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### DECISION

VSE Corporation, of Alexandria, Virginia, protests the termination of a contract awarded to it by the Department of the Army, under request for proposals No. W91CRB-11-R-0016, for support of the Army's Rapid Equipping Force (REF). The Army terminated the contract based on the contracting officer's (CO) finding that the award was tainted by the protester's hiring of a former government employee as a consultant and that individual's participation in the preparation of the protester's proposal. VSE contends that the CO's determination was unreasonable.

We sustain the protest.

## BACKGROUND

The REF is a component of the Army whose mission is to use “current and emerging technologies in order to improve operational effectiveness” for Army forces through the “identification of an immediate warfighter need and the rapid equipping of the warfighter with safe products in the most expeditious way possible.” RFP, Statement of Work (SOW) ¶ 1.2. The work of the REF is supported in large part by contractor staff, under what is known as the “alternative staffing” contract. RFP at 1.

In March 2010, the Army began planning a procurement for the recompetes of the alternative staffing contract, which was being performed by CACI-WGI, Inc. The procurement was conducted by the Army contracting office at the Aberdeen Proving Ground. The CO worked at Aberdeen, and was not based at the REF location.

The RFP was issued on December 21, and was subsequently amended eight times. As relevant here, the RFP stated that “[t]he contractor shall provide all labor, management, and support necessary for supporting the [REF] in the successful accomplishment of its mission.” SOW ¶ 1.3. The solicitation advised offerors that award would be based on the lowest-price, technically-acceptable proposal, considering the non-price factors of technical capabilities and past performance. RFP at 102-103.

The Army received seven proposals by the closing date of April 6, 2011, including proposals from VSE, CACI, and General Dynamics Information Technology (GDIT). The Army source selection authority (SSA) concluded that VSE submitted the lowest-priced, technically acceptable proposal of \$68 million, and selected VSE’s proposal for award on May 23.

### Actions of the REF Deputy Project Manager

This protest primarily concerns the actions of a former government employee who served as the REF deputy project manager (DPM) from the time the Army began its planning for the procurement until his departure from government service. CO Statement at 1; Hearing Transcript (Tr.) at 227:11-14.<sup>1</sup> The DPM’s primary area of responsibility was the acquisitions branch activity for the REF, which he describes as “the external operations of the REF, such as getting equipment into theater.” Agency Report (AR), Tab X-1, Decl. of Former DPM (July 26, 2011) ¶ 2.

In March 2010, the DPM attended a meeting with the CO, the source selection authority (SSA), and the REF contracting team lead. CO Statement at 4. This meeting was for the purpose of discussing the acquisition plan, SOW, and evaluation

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<sup>1</sup> Our Office conducted a hearing on October 17, 2011, to further develop certain protest issues, at which the CO and the former DPM provided testimony.

criteria to be used in the RFP. Id. at 4-5. The DPM attended three additional meetings at the REF concerning the solicitation from March to May 2010. Tr. at 303:1-5.

In late September or early October, the DPM was asked to review revisions to portions of the SOW which pertained to his work responsibilities. AR, Tab Y, REF Responses ¶ 9. In a declaration, and in his hearing testimony, the DPM stated that he did not review these materials in detail. AR, Tab X-2, Decl. of Former DPM (Aug. 10, 2011) ¶¶ 3-4; Tr. at 334:22-335:17, 353:15-17, 451:15-19.

In early December 2010, the DPM advised the Army of his plans to resign. Tr. at 361:4-5. The DPM left his work at the Army on December 17, and was on terminal leave (use of his annual leave until his formal end of employment) from December 20, 2010 until January 31, 2011. AR, Tab X-1, Decl. of Former DPM (July 26, 2011) ¶ 1.

In early January 2011, the DPM requested an opinion from an Army ethics counselor concerning his prospective employment as a consultant for a number of contractors who work for the REF, including VSE. AR, Tab W-3, Ethics Counselor Letter, Jan. 13, 2011, at 1; see Tr. at 379:2-15. At about the same time, the DPM received an inquiry from VSE concerning employment. AR, Tab W-3, Ethics Counselor Letter, Jan. 13, 2011, at 1. On January 13, 2011, the ethics counselor provided the DPM an opinion, which stated that “[y]ou have advised me that you intend to seek behind the scenes employment as a consultant with several contractors, to include VSE . . .” Id. The counselor noted that the DPM had “taken action on numerous contracts within the last year,” and thus had “participated personally and substantially in a particular matter in which the compan[ies] working on these contracts have a financial interest.” Id. The counselor also noted that “[i]t is my understanding that you are not currently engaged in any procurement activity, but rather work only on existing contracts.” Id. at 2. As discussed in detail below, the ethics counselor advised the DPM of the post-employment restrictions that applied to him as a result of his work for the REF, but advised that he was not prohibited from providing “behind-the-scenes” assistance to contractors. Id. at 3.

The DPM completed his terminal leave and ended his employment with the Army on January 31. At that time, the agency completed an outprocessing form, which indicated that the former DPM returned all of his government-issued equipment, including his laptop computer. AR, Tab W-2, Former DPM Outprocessing Form.

On February 4, the now-former DPM entered into a consulting agreement with VSE. AR, Tab W-4, VSE Consulting Agreement. The agreement ran from February 7 to March 1. The DPM states that his work for VSE actually concluded on February 20. Tr. at 388:7-9. As discussed in detail below, the former DPM states that his work for VSE involved reviewing sections of VSE’s proposal for the alternate staffing contract, prior to its submission. AR, Tab X-1, Decl. of Former DPM (July 26, 2011) ¶ 12.

On April 21, the former DPM returned to the Army's REF to work as a consultant via a subcontract under a contract awarded by the Office of the Secretary of Defense. Tr. at 289:12-290:4; Email from VSE to GAO, Nov. 3, 2011; Email from Agency to GAO, Nov. 3, 2011. On April 28, the former DPM signed a nondisclosure agreement with the REF concerning his new consulting work. AR, Tab S, Former DPM Nondisclosure Agreement.

#### Agency-Level Protest and CO Investigation

Following the award to VSE, CACI filed an agency-level protest. In its protest, CACI argued that VSE gained an improper competitive advantage from its "use of a former senior government employee from the very same program which is covered under the solicitation," that is, the former DPM. AR, Tab N, CACI Protest, at 1.

In response to CACI's protest, the CO conducted an investigation regarding the activities of the former DPM in connection with the alternative staffing procurement, and his work for VSE. The CO submitted questions and received responses from CACI; individual contractor personnel; the REF's Deputy Director; and the former DPM. As relevant here, the former DPM provided an initial response to the CO's questions on July 14, and a supplemental declaration on July 26. AR, Tab W-1, Former DPM Responses to CO Investigation (July 14, 2011); Tab X-1, Decl. of Former DPM (July 26, 2011).

Based on her investigation, the CO identified the following 10 "findings of fact":

[1] The REF states, and [the former DPM] confirms, he actively participated in the development of [the] initial REF staffing requirement procurement strategy, initial REF acquisition strategy, the initial development of the [SOW], and participated in acquisition strategy discussions.

[2] The REF states that [the former DPM], in his role as REF Deputy Project Manager, reviewed the revised [SOW] acquisition branch position descriptions sometime in late September and early October 2010.

[3] The REF states that [the former DPM] provided input to the REF Award Fee Board for the REF Acquisition and Contracting Branches under the incumbent REF Staffing Support Contract which is held by the protester, CACI.

[4] The REF states that [the former DPM] had full access to his government email accounts and electronic files until January 31 or February 1, 2011.

[5] The REF states that [the former DPM] completed out-processing from the REF on January 31, 2011 and turned in his government laptop on February 1, 2011.

[6] [The former DPM] signed a consulting agreement with VSE on February 4, 2011 that was effective from February 7 to March 1, 2011, set to end just five [days] after the initial due date for proposal submission of March 1, 2011.

[7] [The former DPM] confirms that he reviewed the proposal submission for VSE prior to the response due date.

[8] [The former DPM] admits that he told several individuals that he advised one or two competing companies regarding their proposal submission[s].

[9] [The former DPM] admits that he [] attended a VSE proposal presentation meeting and was introduced as a former REF Deputy Program Manager two weeks after [the former DPM] was out-processed by the REF and only ten days prior to the proposal submission due date for the Alternate Staffing Requirement.

[10] [The former DPM]'s Nondisclosure Agreement with the REF was signed on April 28, 2011, nearly three months after his out-processing from the REF and nearly two months after the extended due date for submission of proposals.

AR, Tab P, Termination Rationale, at 1-2.

Based on these findings, the CO concluded that the former DPM's actions, and his work on behalf of VSE, created an appearance of impropriety, as follows:

Based on the above findings, and in accordance with the definition of participating personally and substantially in a Federal agency procurement located at [Federal Acquisition Regulation (FAR) §] 3.104-1, it is my determination that [the former DPM] participated personally and substantially as a Government Officer in the preparation of the REF [Alternate] Staffing solicitation. It is also my determination that [the former DPM]'s above-referenced activities regarding the REF Alternate Staffing solicitation and his employment as a consultant with VSE created the appearance of a conflict of interest. I further determine that [the former DPM]'s activities and his employment by VSE as a consultant created at least the appearance of impropriety regarding the REF Alternate Staffing procurement and the contract award to VSE.

Id. at 2.<sup>2</sup>

In her response to the protest, and in her hearing testimony, the CO elaborated that her conclusion regarding an appearance of impropriety was based on the collective effect of the 10 facts cited in her termination rationale. Tr. at 75:1-9, 105:2-9. The CO also explained that although she was not able to “conclusively” establish certain facts, she was required under FAR § 3.101 to avoid “even the appearance of any improprieties”:

I was not able to conclusively establish that [the former DPM] had access to competitively useful source selection information that he provided to VSE during the period of his consultation with VSE. However, I also was not able to conclusively rule out that possibility. Also, I was not able to conclusively establish that [the former DPM] had violated any procurement rules or regulations related to his activities after his resignation as REF Deputy PM—hence my decision ultimately not to request an investigation by the Army’s Criminal Investigation Command.

CO Statement at 15-16.

In her testimony, the CO acknowledged that the former DPM was advised by the 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. Tr. at 206:5-10; see also CO Statement at 13. The CO stated that she nonetheless believed that the former DPM’s actions on behalf of VSE were in violation of that statute. Tr. at 101:6-102:10; 224:4-14.

Based on her conclusions, the CO terminated VSE’s award on August 3, 2011. The CO then awarded the contract to GDIT, the offeror who was next in line for award. CO Statement at 4. Following the notice of termination, VSE filed this protest with our Office.<sup>3</sup>

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<sup>2</sup> FAR § 3.104, cited by the CO above (pertaining to the Procurement Integrity Act, 41 U.S.C. § 2101 et seq. (2011)) and FAR § 3.104-7 identify actions that an agency can take for “violations or possible violations” of the Procurement Integrity Act, including disqualifying an offeror. FAR § 3.104-7(d)(1)(ii).

<sup>3</sup> Based on the CO’s decision to terminate VSE’s contract and make a new award to GDIT, the Army dismissed CACI’s agency-level protest as academic. AR, Tab O, Agency Protest Decision, at 3.

## DISCUSSION

VSE challenges the CO's conclusion that its hiring of the former DPM as a consultant merited termination of the contract. Specifically, VSE challenges the CO's finding that the former DPM's actions on behalf of VSE gave the protester an unfair competitive advantage. VSE argues that the CO's termination decision was unreasonable because it improperly relied on assumptions, rather than hard facts, and was also based on an incorrect understanding of the applicable legal standards. For the reasons discussed below, we agree.

One of the guiding principles recognized by our Office is the obligation of contracting agencies to avoid even the appearance of impropriety in government procurements. See FAR § 3.101; Celeris Sys., Inc., B-404651, Mar. 24, 2011, 2011 CPD ¶ 72 at 7; Guardian Techs. Int'l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 5. Where a firm may have gained an unfair advantage through its hiring of a former government official, the firm can be disqualified from a competition based upon the appearance of impropriety which is created by this situation—even if no actual impropriety can be shown—so long as the determination of an unfair competitive advantage is based on hard facts and not on mere innuendo or suspicion. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28; see NKF Eng'g, Inc. v. U.S., 805 F.2d 372 (Fed. Cir. 1986).<sup>4</sup>

The existence of an appearance of impropriety based on an alleged unfair competitive advantage depends on the circumstances in each case. As a general matter, in determining whether an offeror obtained an unfair competitive advantage in hiring a former government official based on the individual's knowledge of non-public information, our Office has considered a variety of factors, including whether the individual had access to non-public information that was not otherwise available to the protester, or non-public proprietary information of the protester, and whether the non-public information was competitively useful. See Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63 at 13; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 at 8; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., et al., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 7-8. An unfair competitive advantage is presumed to arise where an offeror possesses competitively useful non-public information that would assist that offeror in

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<sup>4</sup> As our Office has recognized, the unfair competitive advantage analysis stemming from a firm's hiring of a former government employee is virtually indistinguishable from the concerns and considerations that arise in protests alleging that a firm has gained an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest. See Health Net Fed. Servs., LLC, supra, at 28 n.15.

obtaining the contract, without the need for an inquiry as to whether that information was actually utilized by the awardee in the preparation of its proposal. Health Net Fed. Servs., LLC, *supra.*, 2009 CPD ¶ 220 at 28 n.15; Aetna Gov't. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 18-19 n.16.

In reviewing bid protests that challenge an agency's conflict of interest determinations, the Court of Appeals for the Federal Circuit has mandated application of the "arbitrary and capricious" standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). Thus, to challenge an agency's identification of a disqualifying conflict of interest, a protester must demonstrate that the agency's determination did not rely on hard facts, but was instead based on mere inference or suspicion of an actual or potential conflict, or is otherwise unreasonable. See Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). In Axiom, the Court of Appeals noted that "the FAR recognizes that the identification of conflicts of interest . . . are fact-specific inquiries that require the exercise of considerable discretion." Axiom Res. Mgmt., Inc., 564 F.3d at 1382.

The standard of review employed by this Office in reviewing a contracting officer's conflict of interest determination—including findings concerning actual or apparent improprieties arising from such conflicts under FAR part 3.1—mirrors the standard required by Axiom and Turner. In this regard, we review the reasonableness of the contracting officer's investigation and, where an agency has given meaningful consideration to whether a conflict of interest exists, will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 *et al.*, Aug. 4, 2011, 2011 CPD ¶ 156 at 17.

Based on the legal standards discussed above, we conclude that the CO had the authority under FAR § 3.101 to terminate VSE's contract if she reasonably found that there was an actual or apparent impropriety arising from VSE's hiring of the former DPM. The authorities also make clear that the CO was not required to conclude that VSE actually gained a competitive advantage, and instead could have concluded that there was an appearance of an impropriety based on the possibility that the DPM could have conferred a competitive advantage to the firm. To support the latter finding, however, the CO needed to identify hard facts—as opposed to suspicion or innuendo—that showed that VSE may have gained an unfair competitive advantage through its hiring of the former DPM. See Turner Constr. Co., Inc., 645 F.3d at 1387.

## Former DPM's Actions Concerning the RFP

We first address the CO's findings of fact concerning the former DPM's actions during his time as a government employee (finding Nos. 1 and 2). As discussed above, the CO found that the former DPM "actively participated in the development of [the] initial REF staffing requirement procurement strategy, the initial REF acquisition strategy, the initial development of the [SOW], and participated in acquisition strategy discussions." AR, Tab P, Termination Rationale, at 1. The CO also found that the former DPM "reviewed the revised [SOW] acquisition branch position descriptions" in late September or early October 2010. Id.

The CO explains that her findings of fact were based on information provided by the REF to the CO's investigation following the CACI protest, and the CO's attendance of a meeting in March 2010 meeting with the former DPM. CO Statement at 14-15. The CO's findings pertain to two periods of time: (1) March through May 2010, and (2) late September to early October 2010.

### The Former DPM's Actions from March through May 2010

The CO's understanding of the former DPM's role in the procurement from the start of the procurement planning process in March 2010 through May 2010, was based on her attendance at a meeting with the former DPM, and information provided by the REF in response to the CO's post-award investigation.

Specifically, the CO states that, in March 2010, she attended a meeting with the former DPM, the REF contracting team lead, and the SSA. The purpose of the meeting was to "help develop the statement of work, the acquisition strategy plan, as well as the evaluation criteria." Tr. at 23:7-11. After this meeting, the CO did not meet again with the former DPM; instead, her primary contact was the REF contracting team lead. Tr. at 25:9-12, 110:9-11.

The REF's responses to the CO's investigation advised, generally, that "[the former DPM] participated in developing the initial procurement strategy for the contract action, developed portions of the SOW, and reviewed the SOW as Deputy Project Manager." AR, Tab Y, REF Responses ¶ 7. The REF also explained that the former DPM "initially prepared the Acquisition Branch portion of the SOW during late Spring, 2010." AR, Tab Y, REF Responses ¶ 8. The acquisition branch requirements were in section 2.13 of the SOW.

Apart from the March 2010 meeting, and the REF's responses to her questions, the CO states that her understanding of the former DPM's role in the procurement was based on her assumption that the REF contracting team lead reported to the former DPM. In this regard, the CO states that the REF contracting team lead was her "counterpart" for the REF, and the person with whom she interacted on a daily basis during the development of the RFP. Tr. at 110:4-5. The CO stated that she understood that the REF contracting team lead reported to the former DPM, and,

based on this understanding, assumed that the former DPM had overall responsibility for the RFP. Tr. at 23:22-24:1, 87:10-14, 110:9-21. Based on her assumption that the former DPM had overall responsibility for the RFP, she also assumed that the former DPM had access to non-public, procurement sensitive information. Tr. at 21:22-22:7 (“CO: [I]n this particular procurement, he was overseeing at least the initial beginnings of the procurement.”)

VSE and the former DPM raise several challenges to the CO’s assumptions. With regard to the initial acquisition strategy and development of the SOW, the former DPM states that his involvement with the solicitation was minimal, limited to the very early phases of the REF’s development of the solicitation, and was generally not reflected in the solicitation. AR, Tab X-1, Decl. of Former DPM (July 26, 2011) ¶ 4. For example, he initially recommended that the RFP be awarded on a best value, rather than a low-cost technically acceptable basis, *id.*; the solicitation was ultimately issued on a low-cost technically acceptable basis. The former DPM also states that he recommended that the staffing for the acquisition branch activity portion of the SOW be organized into “execution teams” to address specific agency needs. *Id.* This recommendation was not adopted. Additionally, the former DPM states that he edited a draft of what became SOW ¶ 2.13.5, to reflect his proposal for the execution teams, and may have provided some edits to other parts of SOW ¶ 2.13. Tr. at 314:1-20.

The CO acknowledged that the former DPM made these recommendations during the March 2010 meeting. Tr. at 118:11-119:6. The CO also agreed, however, that the final version of the RFP does not reflect the former DPM’s substantive suggestions. Tr. at 123:3-7; 240:7-17. With regard to the former DPM’s suggestion that the award be on a best-value basis or use a different approach to the organization of personnel, the Army has not provided any basis to conclude that the former DPM’s suggestion of alternate approaches constituted non-public information that provided a competitive advantage.<sup>5</sup>

With regard to the CO’s assumption that the former DPM supervised the REF contracting team lead, the former DPM testified that the REF contracting team lead did not in fact report to him, and was instead in a separate line of command. Tr. at 286:19-287:2; VSE Post-Hearing Exhibit, at 1. In her testimony, the CO acknowledged that she did not know for certain whether the REF contracting team lead reported to the former DPM, and that she simply assumed that he reported to the former DPM. Tr. at 262:22-264:3. As noted above, the CO’s assumption that the former DPM had access to non-public, procurement sensitive information was based

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<sup>5</sup> While the agency’s and intervenor’s post-hearing comments suggest that the former DPM may also have had insight and input as to who would be the evaluators for this acquisition, the record does not show that this is an issue that has been considered by the CO.

in part on her assumption that he supervised the REF contracting lead, and therefore had overall responsibility for the RFP. The Army has not rebutted the DPM's testimony. In fact, the Army has not provided any information that demonstrates that the REF contracting team lead reported to the former DPM, or that the former DPM had supervisory responsibility for the contracting team lead's work on the RFP, or for the RFP as a whole.

Moreover, while the CO testified that she believed that the former DPM's actions conferred a competitive advantage on VSE, Tr. at 250:17-21, she acknowledged in her response to the protest that "I was not able to conclusively establish that [the former DPM] had access to competitively useful source selection information that he provided to VSE during the period of his consultation with VSE." CO Statement at 15. Specifically, with respect to the former DPM's activities prior to May 2010, the CO conceded that she could not identify specific non-public, competitively useful information to which he may have had access. Tr. at 95:9-14, 119:7-20, 235:8-20, 237:13-240:17. In sum, there is nothing in the record to date that shows that the former DPM had access to competitively useful, non-public information from March through May 2010.

#### The Former DPM's Actions from Late September/Early October 2010

With regard to the former DPM's activities after May 2010, the CO states that she was not involved with his work, and did not have personal knowledge of his actions. Tr. at 126:6-20. Instead, she relied on the REF responses, which indicated that the former DPM "reviewed the revised SOW position acquisition branch descriptions sometime in late Sep and early Oct 2011." AR, Tab Y, REF Responses ¶ 8.

The former DPM acknowledged that he was asked in late September/early October 2010 to review the draft SOW concerning the positions that involved the REF acquisition branch. AR, Tab X-2, Declaration of Former DPM (Aug. 10, 2011) ¶ 3. During the hearing, he testified that he does not recall whether he was provided the entire SOW, or just section 2.13, which pertained to his area of responsibility. Tr. at 353:4-12. The former DPM stated that he began to review the SOW positions, but found "significant errors that did not make sense but appeared to be copy and paste mistakes." AR, Tab X-2, Declaration of Former DPM (Aug. 10, 2011) ¶ 4. He states that he then ceased his review, and brought the errors to the attention of the REF Deputy Director, who asked the former DPM to address the matter. *Id.* The former DPM states that he refused to do so, and did not work on the SOW after that time. *Id.*

Based on the REF response, the CO found that the former DPM's review of the SOW in late September/early October created an appearance of impropriety. AR, Tab P, Termination Rationale, at 1. In her testimony, however, the CO acknowledged that she does not know what the former DPM did with regard to the revised SOW. Tr. at 86:12-19, 240:18-241:6. Specifically, the CO does not know whether he reviewed the SOW for content, made revisions, or made other comments. *Id.* She

stated, however, that she believes that the word “review,” as used in the REF’s response to her investigation, was meant to indicate that he did substantive work, rather than a check for typographical errors. Tr. at 132:2-17. In this regard, the CO stated that she assumed that the former DPM had overall responsibility for the RFP, and that “he would review the statement of work prior to release to make sure that it [] captured everything that the REF wanted.” Tr. at 84:19-21.

More significantly, the CO acknowledges that the draft SOW was released for public review in early September 2010, immediately prior to the former DPM’s review.<sup>6</sup> Tr. at 138:4-14, 142:11-22, 148:1-10, 236:14-237:5. In this regard, the CO testified as follows:

GAO: So just to be clear . . . is it your understanding that whatever [the former DPM] reviewed [in late September or early October 2010] was subsequently made public?

CO: Eventually, yes.

GAO: So was there anything that he reviewed that would give someone a competitive advantage based upon the fact that he had seen it but no one else had?

CO: My argument there is that he had knowledge of -- no.

Tr. at 142:11-22.

The CO also testified that the former DPM’s access to information throughout the development of the RFP could have provided a competitive advantage based on the timing of his access. In this regard, the CO explained that even if all of the information reviewed by the former DPM was subsequently disclosed, his access to that information before the RFP was released could have provided offerors with a competitive advantage. Tr. at 235:8-20. As discussed above, however, the former DPM’s consulting agreement with VSE was signed on February 4, 2011, well after the December 21, 2010, release date for the RFP. The CO does not explain how this sequence of events could have allowed the former DPM to give VSE an unfair competitive advantage based on his access to information before it became public.

On this record, we think that the CO’s findings of fact (Nos. 1 and 2) do not establish that the former DPM had access to competitively useful, non-public information, and do not support the CO’s conclusion that his role in advising VSE gave rise to a conflict of interest or an appearance of impropriety. As our Office has recognized, a

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<sup>6</sup> A notice on the FedBizOpps website shows that a draft SOW was released by the agency on September 1, 2010, and was revised on September 13.

government employee's participation in the drafting of an 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. See ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 at 7-8. Here, the Army has not explained how the former DPM's contributions to or review of documents that were available to the public through the issuance of the RFP--and in some cases in draft form before his input or review--constitute hard facts that he had access to competitively useful, non-public information.

#### Former DPM's Participation in the CACI Award Fee Board

Next, the CO found that the former DPM "provided input to the REF Award Fee Board" in connection with the incumbent contract performed by CACI (finding No. 3). AR, Tab P, Termination Rationale, at 1. The CO's finding was based on the following statement provided by the REF in response to her investigation:

REF leadership has no knowledge of whether [the former DPM] had access to CACI's staffing, pricing, or other non-public information. Under the current REF Staffing Support Contract, [the former DPM] provided input to the REF Award Fee Board for the REF Acquisition and Contracting Branches.

AR, Tab Y, REF Responses ¶ 11.

In a declaration submitted with VSE's protest, the former DPM states that his work with the REF involved oversight of the Acquisitions Branch, which included four CACI employees assigned to the branch. AR, Tab X-2, Decl. of Former DPM (Aug. 10, 2011) ¶ 5. The former DPM states that his work for the award fee board required him to provide input concerning the quality of CACI's performance on a point scale under four categories. Id.; see also Tr. at 393:1-394:5. Specifically, he explained his role as follows:

I provided those assessments, which I understood would be combined with the input of other civilians overseeing the 130-member contractor workforce to determine the contractor's fee award. While I participated in approximately four round table discussions during the 2.5 years serving as the [DPM] with the other section leaders, I was not privy to the Deputy Director's final roll-up of the Agency's assessment of CACI performance or fee award. I also did not have access to any CACI cost or price related information as part of the fee award input process, or for any other reason.

AR, Tab X-2, Decl. of Former DPM (Aug. 10, 2011) ¶ 5. The former DPM also states that he did not know the amount of CACI's award fee. Tr. at 395:6-8.

In her testimony, the CO stated that she concluded that the former DPM's participation in the award fee board gave him access to proprietary information concerning CACI's incumbent contract that would have been competitively useful for the follow-on competition. Tr. at 43:7-11. The CO stated in her direct testimony that she understood that the former DPM "was aware of what their award fee and the percentage based on the total contract value was . . . [and could] do simple math and determine what their pricing was." Tr. at 43:3-6. The CO also explained that she "signed the award fee," and was provided documentation concerning the award fee board's work. Tr. at 156:1-6.

The CO also acknowledged, however, that she did not participate in the award fee board review process, and did not know what the former DPM and the other award fee board members were provided to review. Tr. at 46:22-47:10. The CO stated that she assumed that the former DPM had access to information concerning CACI's award fee based on the document she reviewed, as well as her belief that the former DPM had input into those documents. Tr. at 150:12-20, 154:6-21, 156:1-10. She conceded, however, that she was not certain whether the former DPM had actually reviewed the same documents that she was provided. Tr. at 156:13-20. Additionally, the CO acknowledges that she assumed that CACI's award fee was non-public information, but was not certain. Tr. at 77:18-78:15.

On this record, we think that the CO's finding here relied on her assumptions, rather than hard facts. To the extent that the CO believed that hard facts existed concerning the information that the former DPM may have accessed through his work on the CACI award fee board, the agency has not provided evidence to support the CO's belief.

#### Former DPM's Access to Computer Files and Equipment

Next, we address the CO's finding that the former DPM had access to computer files that may have contained procurement sensitive information, and that he continued to have access to this information during his terminal leave through his laptop computer (finding Nos. 4 and 5).

With regard to the former DPM's laptop and computer access files, the CO was advised by the REF as follows:

[The former DPM] had full access to his government email accounts and electronic files up until 1 Feb 2011. [The former DPM] turned in his laptop computer on 1 Feb 2011. After 1 Feb 2011, REF leadership has no knowledge of whether or not [the former DPM] had access to contract or solicitation information.

\* \* \* \* \*

[The former DPM] completed out-processing procedures with the REF on 31 Jan 2011 and turned in his laptop computer on 1 Feb 2011.

AR, Tab Y, REF Responses ¶¶ 9-10.

During her investigation, the CO was provided the former DPM's outprocessing form, which indicated that he completed his outprocessing from government employment on January 31, 2011. AR, Tab W-2, Former DPM Outprocessing Form, at 1. The form states that the former DPM returned his computer and all other government equipment on January 31. Id.

As discussed above, the former DPM was on terminal leave from December 20, 2010, through his outprocessing date on January 31, 2011. In his response to the CO's investigation, the former DPM stated that he returned his laptop to the REF "on/about 19 December [2010]," but that he retained his common access card (CAC) until January 20, 2011, to complete work on officer evaluation reports (OERs). AR, Tab W-1, Former DPM Responses to CO Investigation ¶ 4.

The former DPM also stated, in a declaration provided with VSE's protest, that he retained his government-issued Blackberry device during his terminal leave, but that it did not give him full access to his email accounts or other electronic files. AR, Tab X-2, Decl. of Former DPM (Aug. 10, 2011) ¶ 6. In another declaration, provided with VSE's comments on the agency report, the former DPM stated that he retained his CAC during his terminal leave in order to be able to generate an electronic signature required for the OERs. Decl. of Former DPM (Sept. 22, 2011) ¶ 4. He stated, however, that he was not able to use his CAC because he did not have his government-issued laptop, which was enabled with a CAC reader. Id. The former DPM provided emails indicating that he sought assistance from an REF employee to obtain software for his personal computer that would have allowed him to use his CAC at home, but was unsuccessful in installing the software. Id., ¶ 5; attach., Former DPM's and REF Employees Emails (Jan. 14, 2011). As a result, the former DPM completed his OERs at the REF using a colleague's computer, around the time he completed his outprocessing. Id. ¶ 5.

During the hearing, the former DPM affirmed his statement that he returned his laptop prior to going on terminal leave. Tr. at 364:3-7. He conceded, however, that he has no documentation of this fact. Tr. at 374:2-6. He also acknowledged that, at the time he completed outprocessing, he did not dispute or seek to clarify the notation on his outprocessing form that shows that he returned his laptop on January 31, 2011. Tr. at 373:16-374:1.

The CO concluded, based on the REF's responses and the outprocessing form, that the former DPM did not return his laptop until he outprocessed on January 31.<sup>7</sup> AR, Tab P, Termination Rationale, at 1. The CO acknowledged that the former DPM stated in his response to the investigation that he returned his laptop on December 19, 2010, and that he provided additional details to corroborate his account in his declarations in support of VSE's protest. The CO stated, however, that she did not believe the former DPM's accounts in making her termination decision, and, as of the date of the hearing, does not believe that his additional information is credible. Tr. at 174:9-12, 176:15-22. The CO appears to have believed that this was significant because, as discussed below, she also relied on the REF's statement that the former DPM's laptop permitted him to access information on the REF network, during the time he was on terminal leave. See AR, Tab P, Termination Rationale, at 1; Tab Y, REF Responses ¶ 9.

We find that the CO acted reasonably, and within her discretion to conclude that the former DPM's laptop was returned in January 2011, rather than December 2010, as stated by the former DPM. Although the former DPM has provided a declaration and testimony which corroborate his account that he returned his computer in December, this evidence was provided after the CO made her decision to terminate VSE's contract. In our view, the CO could reasonably reject the former DPM's statement that he returned the laptop in December, and instead rely on the evidence provided in his outprocessing form, which states that the laptop was returned on January 31, 2011.

Next, based on the REF's responses to her questions, the CO found that the former DPM "had full access to his government email accounts and electronic files until January 31 or February 1, 2011." AR, Tab P, Termination Rationale, at 1. Although the REF response does not specifically explain the basis for its statement, it appears that the REF response assumed that the former DPM could have accessed his email and files on the REF network through his laptop. See AR, Tab Y, REF Responses ¶ 9.

The CO stated that she believed that the former DPM would have had access through the REF computer networks to information pertaining to CACI's incumbent contract and the alternative staffing procurement. The CO also stated that she was aware of two computer systems at the REF where information was stored: the REF's classified Secret Internet Protocol Router Network (SIPRNet), and a networked drive, known as the K drive, to which all government and contractor personnel had access. Tr. at 158:18-159:19, 160:1-3. In this regard, the CO stated that she believed that all government and personnel had access to the K drive; for this reason, she

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<sup>7</sup> The CO's termination rationale cites an outprocessing date of February 1, 2011. In her testimony, the CO clarified that she believed that the former DPM returned his laptop on the date he actually completed outprocessing, i.e., January 31. See Tr. at 177:20-178:1.

believed that the REF would have used only the SIPRNet to store procurement sensitive information. Tr. at 161:3-162:19, 164:16-166:11. The CO also acknowledged that she did not access the SIPRNet, and believed that there were no files to access on the K drive. Tr. at 160:17-19, 164:20-165:11.

In her testimony, the CO states that her understanding of the way in which the REF maintained the alternative staffing procurement files was based on conversations with the REF contracting team lead. Tr. at 166:21-167:18. She acknowledged, however, that she did not ask him whether the former DPM had access to those files. Tr. at 170:16-171:19. The CO also acknowledges that she did not investigate whether the former DPM had actually accessed any REF computer files during his terminal leave.<sup>8</sup> Tr. at 197:1-14.

The former DPM acknowledged that he had access to both the K drive, and the REF SIPRNet when he had his computer. AR, Tab X-2, Decl. of Former DPM (August 10, 2011) ¶ 7; Tr. at 350:14-17. The former DPM further states that he was not aware of any folders on the K drive that contained procurement sensitive information relating to the alternate staffing procurement. Tr. at 349:8-14. The former DPM stated that he believed that all government and contractor personnel could access the K drive, and that it was possible to restrict certain folders with password protection. Tr. at 349:16-350:4. He contends, however, that he was not given access to any folders on the K drive pertaining to the alternate staffing procurement. Tr. at 350:5-13.

After the hearing, the Army provided two declarations concerning the storage of information at the REF. The first declaration states as follows:

All soft copy contracting documents regarding the CACI [incumbent] contract, and source selection sensitive material applicable to the re-compete for this effort is maintained on the shared “K” Drive in a restricted file titled “Professional Staffing Contract.”

Decl. of REF Chief of Contracts (Oct. 20, 2011) at 1. The second declaration provided a list of “the current and former REF members whose names are or were on the access list that provides them access to the [CACI] re-compete materials stored on the REF’s ‘K’ drive.” Decl. of Senior Desktop Support Engineer (Oct. 19, 2011) at 1. The former DPM was on that list. Id.

A third document was provided to the CO along with these declarations, but was not provided by the Army to the protester and intervenor until October 24, after the

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<sup>8</sup> The CO testified that she did not know whether it was possible to look into computer files and determine whether or not the former DPM accessed information in the computer system. Tr. at 197:4-10.

parties submitted their post-hearing comments. This email, from the REF Deputy Director of Operations (DDO) to the CO, stated that when the DDO was asked to investigate whether the former DPM had access to the restricted files on the K drive, he found that neither he nor his supervisor knew the answer. Email from REF DDO to CO (Oct. 20, 2011). The DDO further stated that he “found that myself and [the DDO’s supervisor] had access to this folder and we didn’t know about it,” and that “[i]f this folder was password protected, I never received anything or any instruction on how to access it.” Id.

Thus, while we find that the CO reasonably concluded that the former DPM retained his laptop until he completed his outprocessing, this fact alone does not demonstrate that he had access to competitively useful, non-public information during his time as a government employee at the REF, or, more specifically, the period of December 20, 2010, through January 31, 2011, as cited in the CO’s termination rationale. As discussed above, the CO assumed that the former DPM had access to the REF computer files concerning CACI’s incumbent contract and the alternative staffing procurement, but did not know for certain what files the former DPM could access, or what information could have been retrieved. In fact, the CO was in error in assuming this information would be on the SIPRNet and not on the K drive. Although the CO is entitled to broad deference in her conclusions, the facts here are ambiguous. In this regard, the post-hearing declarations submitted by the Army are not specific as to what materials were stored on the K drive, and whether there was procurement-related information on the drive at the time the former DPM had access. Moreover, the CO has not commented on the post-hearing declarations, and thus has not made any findings based on the new information.<sup>9</sup>

In any event, as discussed below, we think that in light of the CO’s statement that her findings of fact collectively informed her decision, and in light of the defects in other parts of her determination, we cannot conclude that the CO’s finding regarding the laptop is sufficient, standing on its own, to justify the termination.

#### Former DPM’s Post-Employment Activities with VSE

Finally, we address the CO’s findings with regard to the former DPM’s post-employment activities. The CO made five findings of fact concerning the former DPM’s activities after terminating his government employment: he signed a consulting agreement with VSE on February 4, 2011 (finding No. 6); he reviewed VSE’s proposal submission (finding No. 7); he “told several individuals” that he had advised offerors who submitted proposals for the alternate staffing solicitation (finding No. 8); he “attended a VSE Proposal presentation meeting” and was introduced as the former REF DPM (finding No. 9); and he signed a nondisclosure

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<sup>9</sup> We note for the record that there is no finding by the CO that the former DPM had access to offeror proposals—aside from VSE—or to agency evaluation documents.

agreement with the REF on April 28, 2011, months after leaving government employment (finding No. 10). As discussed below, the CO concluded that the former DPM's work for VSE may have violated the criminal statutes that apply to a former government employee's post-employment activities. The record shows, however, that the CO's understanding of those restrictions was not consistent with the applicable statutes and regulations.

The provisions of 18 U.S.C. § 207(a)(1) (2006) impose a permanent prohibition against an individual, who has terminated his or her employment as an officer or employee of the United States, from making any communication intended to influence a United States government employee in connection with "a particular matter" in which the former officer or employee "participated personally and substantially as such officer or employee," and "which involved a specific party or specific parties at the time of such participation." Similarly, the provisions of 18 U.S.C. § 207(a)(2) impose a 2-year prohibition against a former government employee from making a communication intended to influence a United States government employee in connection with a "particular matter," which the former officer or employee "knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States."

As discussed above, the ethics counsel advised the former DPM that the lifetime and 2-year prohibitions under 18 U.S.C. § 207(a)(1) and (2) applied to him with regard to matters where he participated personally or substantially, or that were "pending under [his] official responsibility during the one year period before terminating [his] Government employment." AR, Tab W-3, Ethics Counselor Letter, at 2-3. Despite these prohibitions, the ethics counselor advised the former DPM that the prohibitions did not apply to employment "as a consultant working behind the scenes, and not actually representing [his employer] to [the] federal government." Id. at 3.

With regard to the former DPM's activities on behalf of VSE (finding Nos. 6, 7, and 9), the record shows that the CO considered his actions to be per se improper. In her testimony, the CO acknowledges that the ethics counselor had advised the former DPM that he was not prohibited from "behind-the-scenes" activities on behalf of a contractor. Tr. at 206:5-10; see AR, Tab W-3, Ethics Counselor Letter, at 2-3. The CO testified, however, that she did not know what the terms "behind-the-scenes" meant with regard to the activities that the former DPM was permitted to undertake on behalf of VSE:

GAO: What is your understanding of "behind the scenes"? What would that term mean?

CO: To be honest, I don't have -- I don't know. It's vague. What does that mean? There's no definition listed even in the ethics opinion as to what "behind the scenes" is.

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Protester's Counsel: [ ] I think you were asked this question earlier, but I want to make sure that I've got it on the record. What, in your mind, did that allow him to do?

CO: I have no idea. This statement is very vague.

Tr. at 102:11-17; 206:11-17.

Despite her lack of understanding of the meaning of this term, the CO nonetheless concluded that the former DPM's work was not "behind-the-scenes" employment, and but instead involved prohibited "representing back" to the agency:

Protester's Counsel: Did anything that [the former DPM] did constitute representing VSE back to the Agency that's involved in the procurement here?

CO: Yes.

Protester's Counsel: What did he do that you believe constitutes representing back to the Agency?

CO: He admitted in his responses to my fact-finding questions that he reviewed the proposal submission for VSE.

Protester's Counsel: And it's your understanding that reviewing the proposal submissions constitutes representing back to the Agency?

CO: Yes.

Tr. at 101:20-102:10.

In addition to the CO's belief that the former DPM's work on the VSE proposal constituted "representing back" to the government, the CO also concluded that the former DPM's participation in an internal VSE meeting was improper. The CO's termination decision cited, as a finding of fact, a meeting at which the former DPM was introduced to VSE employees as the former REF DPM. AR, Tab P, Termination Rationale, at 1. This information was provided to the CO by a former VSE consultant, who saw the former DPM at a VSE meeting on February 15, 2011. AR, Tab Z-5, Decl. of Former VSE Consultant (July 16, 2011) ¶ 6; CO Statement at 11, 15. The former DPM acknowledges attending this meeting. AR, Tab W-1, Former DPM Response to CO Investigation ¶ 13.

The CO understood that the meeting did not involve government personnel. CO Statement at 15; Tr. at 103:7-19. The CO nonetheless concluded the former DPM's participation gave rise to an appearance of impropriety because they highlighted his "very public (as opposed to "behind-the-scenes") role as a consultant to VSE." CO Statement at 16. In this regard, the CO provided the following testimony on her view that the former DPM's participation constituted more than "behind-the-scenes" actions:

Protester's Counsel: In the CO statement, you assert [the former DPM] engaged in a very public as opposed to behind-the-scenes role as a consultant; correct?

CO: Correct.

Protester's Counsel: By asserting that he had a very public as opposed to behind-the-scenes role, are you saying that you think he acted in a manner that was inconsistent with the ethics counselor's instructions?

CO: Yes.

\* \* \* \* \*

Protester's Counsel: So your interpretation of "behind-the-scenes" means that he can't actually work with other people who are involved in the proposal?

CO: Right.

Protester's Counsel: What could he do?

CO: 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.

Tr. at 101:6-15; 224:4-14.

We conclude that the CO's findings with regard to the DPM's post-employment activities, as they related to 18 U.S.C. § 207(a), were unreasonable. The CO determined that the former DPM's actions were improper based on his assistance to VSE in reviewing its proposal prior to submission, and his participation in meetings at VSE where his former work for the REF was disclosed. While 18 U.S.C. § 207(a) prohibits former government employees from "representing back" to the government, it does not contain a general prohibition on providing "behind-the-scenes" advice or assistance to offerors.

As relevant here, the regulations promulgated by the Office of Government Ethics (OGE)<sup>10</sup> provide the following guidance with regard to the terms “communication or appearance” and “behind-the-scenes assistance”:

(1) Communication. A former employee makes a communication when he imparts or transmits information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means. This includes only those communications with respect to which the former employee intends that the information conveyed will be attributed to himself, although it is not necessary that any employee of the United States actually recognize the former employee as the source of the information.

(2) Appearance. A former employee makes an appearance when he is physically present before an employee of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication by the former employee.

(3) Behind-the-scenes assistance. Nothing in this section prohibits a former employee from providing assistance to another person, provided that the assistance does not involve a communication to or an appearance before an employee of the United States.

5 C.F.R. § 2641.201(d) (2011)(emphasis added). The above-quoted OGE regulation provides the following relevant example, indicating what kinds of “behind-the-scenes” activities are permitted for a former government employee:

A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

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<sup>10</sup> The OGE was established by the Ethics in Government Act of 1978, and is the agency “that provides overall direction, oversight, and accountability of Executive Branch policies designed to prevent and resolve conflicts of interest.” OGE Website, available at: <http://www.usoge.gov/About/Mission-and-Responsibilities/Mission---Responsibilities>.

5 C.F.R. § 2641.201(d), Example 3.

As the regulation and this example make clear, the bar on “representing back” to the government does not prohibit a former government employee from providing “behind-the-scenes” assistance, such as using his or her knowledge to assist an employer with matters concerning the former employee’s work for the government. The CO does not explain why the former DPM’s actions constituted a “communication” or an “appearance,” as those terms are defined in 5 C.F.R. § 2641.201(d), above. In this regard, the CO does not contend that the former DPM’s name was associated with the VSE proposal, or that he was ever “physically present” before a government official in connection with the proposal.

In sum, while the CO believed that the former DPM’s consulting agreement with VSE, his assistance to VSE in reviewing its proposal, and his participation in an internal VSE meetings were in violation of the statutory and regulatory prohibitions on “representing back” to the government, she provides no support for this conclusion. Instead, the record shows that the CO’s conclusion was based on her incorrect understanding of the applicable post-employment statutes and regulations.<sup>11</sup>

Next, the CO explains that the former DPM’s statements concerning his assistance of offerors (finding No. 8) confirmed for her that he was “coaching other companies.” Tr. at 221:16-17. As discussed above, the CO received declarations from two contractor personnel, who stated that the former DPM stated that he had coached one or more offerors for the alternative staffing contract. CO Statement at 9, 12, 15; AR, Tab Z-2, Decl. of CACI Employee (July 7, 2011), at 1; Tab Z-3, Decl. of CACI Employee (July 15, 2011), at 2; Tab Z-4, Decl. of Reger Group Employee (July 1, 2011), at 1. In response to the CO’s investigation, the former DPM stated that “I did share with a few individuals that I advised one or two competing companies.” AR, Tab W-1, Former DPM Responses to CO Investigation ¶ 8.

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<sup>11</sup> The CO also stated that she considered relevant a statement by a CACI employee that the employee had heard from other individuals that the former DPM had attended a party celebrating the award of a different contract (not the alternate staffing contract at issue here) to one of the firms that had partnered with VSE on the alternate staffing contract. Tr. at 214:1-16, citing AR, Tab Z-3, Decl. of CACI Employee (July 15, 2011) ¶ 7. The CO acknowledges that this declaration was not based on firsthand knowledge, and that the CO did not receive any information from an individual with firsthand knowledge of this alleged event. Tr. at 217:11-16. Even if we assume that that the information was correct, the CO did not clearly explain why the former DPM’s attendance of a party for an unrelated contract award, after he had left government employment, created an appearance of impropriety.

The CO acknowledges that she does not know when the statements were made by the former DPM; she added, however, that it did not matter to her when the statements were made. Tr. at 218:15-219:1-3. The CO agreed, however, that she understood that the statements were made to contractor staff, and not to government officials. Tr. at 103:7-19. As discussed above, we conclude that the CO's belief that the former DPM's actions in support of VSE were per se improper were not consistent with the applicable post-employment statutes and regulations. For this reason, we do not think that the CO reasonably concluded that the former DPM's statements to other non-government individuals concerning those same activities created the appearance of an impropriety.

Finally, the CO concluded that the former DPM's execution of a nondisclosure agreement with the REF "three months after his out-processing from the REF and nearly two month[s] after the extended due date for submission of proposals" was evidence of an appearance of impropriety (finding No. 10). AR, Tab P, Termination Rationale, at 2. The CO does not explain, however, why the former DPM's signing of a nondisclosure agreement after completing his employment as a government employee was improper or gave the appearance of impropriety. As discussed above, the former DPM returned to work at the REF as a consultant on April 21, 2011, and the parties agree that the nondisclosure agreement discussed by the CO in her findings was related to his new role as a consultant, rather than his prior work as a government employee. See Email from VSE to GAO, Nov. 3, 2011; Email from Agency to GAO, Nov. 3, 2011. Moreover, the CO acknowledges that the nondisclosure agreement had nothing to do with any post-employment restriction that applied to the former DPM stemming from his status as a former government employee. Tr. at 227:9-228:21. On this record, we conclude that the CO's finding of fact concerning the nondisclosure agreement provides no support for her termination rationale.

## CONCLUSION

Based on the record here, we conclude that the CO's decision to terminate VSE's award because the procurement was tainted by the appearance of impropriety stemming from the protester's hiring of the former DPM was not reasonable. A finding that an actual or apparent impropriety was created by a firm's hiring of a former government employee must be based on hard facts, rather than suspicion or innuendo, which demonstrate that the former employee could have conferred an unfair competitive advantage to that firm. See Health Net Fed. Servs., LLC, supra., 2009 CPD ¶ 220 at 28; Turner Constr. Co., Inc., 645 F.3d at 1387.

As discussed above, the CO identified 10 findings of fact, and stated that these findings collectively informed her judgment. In the Army's response to the protest, the CO did not state that any particular findings were more important than others, or that there was any overriding theme that informed her judgment, aside from her sense that "something was going on that just wasn't adding up" and that an "outsider" would think that something was "amiss." Tr. at 31:2-4, 33:1-9.

The CO's findings concerning the former DPM's activities in connection with the RFP assumed that they gave rise to a competitive advantage for VSE (finding Nos. 1 and 2). The CO acknowledged, however, that she did not identify any non-public, procurement sensitive information that the former DPM might have accessed regarding the RFP which could have provided a competitive advantage. With regard to the CACI award fee (finding No. 3), the CO based her findings on assumptions concerning information she believed the former DPM may have accessed, despite not being certain about the actual information to which the former DPM had access. Thus, these findings are not based on hard facts of an appearance of impropriety, but on assumptions.

With regard to the CO's findings concerning the former DPM's laptop (finding No. 5), we agree that the CO was within her discretion to disregard the former DPM's explanations and rely upon the information provided by the REF which showed that he returned his laptop on January 31, 2011. However, the CO's assumptions regarding the former DPM's access to REF computer systems, which may have contained proprietary CACI information and procurement sensitive information concerning the RFP (finding No. 4), were erroneous and based on assumptions rather than hard facts. Although the agency has provided additional declarations concerning the networks where the information is currently stored, the record is not clear as to what information was stored during the time the former DPM might have had access. Moreover, the CO has not examined or addressed this newly-produced information.

With regard to the former DPM's post-employment activities, the CO viewed his actions as per se unreasonable because, in her view, they constituted more than "behind-the-scenes" advice (finding Nos. 6-10). The CO acknowledged, however, that she did not understand what "behind-the-scenes" advice meant, and the record shows that her understanding of his actions is inconsistent with 18 U.S.C. § 207(a) and the associated regulatory guidance.

In sum, we do not think that the CO's findings regarding the laptop, and the uncertain information regarding the former DPM's access to computer files can support the termination decision, in light of the significant concerns about her findings regarding his access to non-public RFP information, his post-employment activities on behalf of VSE, or his role in the CACI award fee board. On this record, bearing in mind the collective nature of the CO's analysis of her findings of fact, we are unable to unravel or segregate the effects of the unsupported assumptions and incorrect legal conclusions from the reliance on otherwise reasonable conclusions. For this reason, we sustain the protest.<sup>12</sup>

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<sup>12</sup> Our decision is not intended to reflect our judgment that the former DPM's actions are 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. Instead, our  
(continued...)

## RECOMMENDATION

For the reasons discussed above, we recommend that the Army conduct a new review of the former DPM's role in the procurement, consistent with our decision, to determine whether the award to VSE should be terminated. Specifically, we recommend that the CO reconsider the available information, and obtain any new information necessary, to establish the "hard facts" concerning the former DPM's actions. We also recommend that the CO evaluate these facts under the appropriate legal authorities in making her new judgment. In the event that the Army determines that the former DPM's and VSE's actions merit termination of the contract, the agency should document the bases for that decision. In the event that the Army determines that there is no basis to find that the former DPM's and VSE's actions created an actual or apparent impropriety that warrants termination of VSE's contract, it should reinstate the award to the protester.

We also recommend that VSE be reimbursed the costs of filing and pursuing this protest, including reasonable attorney fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2011). VSE should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson  
General Counsel

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(...continued)

decision reflects our conclusion that, based on the CO's findings and responses to the protest, many of her findings of fact relied on assumptions, rather than hard facts, and that her understanding of certain legal authorities was incorrect.