United States Court of Appeals for the Federal Circuit

2010-5003

PAI CORPORATION
(doing business as Professional Analysis),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee,

and

INNOVATIVE TECHNOLOGY PARTNERSHIPS, LLC,

Defendant.

Appeal from the United States Court of Federal Claims in 09-CV-411,
Senior Judge John P. Wiese.

PRINCIPAL BRIEF OF PLAINTIFF-APPELLANT PAI CORPORATION

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NONCONFIDENTIAL

December 10th, 2009

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PAI CORP v. US

NO. 2010-5003

CERTIFICATE OF INTEREST

Counsel for the (~~petitioner~~) (appellant) (~~cross appellant~~) (~~respondent~~) (~~appellee~~) (~~amicus~~), (name of party) PAI Corporation, certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

PAI Corporation, 116 Milan Way, Oak Ridge, Tennessee 37830-6913

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

PAI Corporation, 116 Milan Way, Oak Ridge, Tennessee 37830-6913

3. All parent corporations and any publicly held companies that hold 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Cyrus E. Phillips IV

December 10th, 2009
Date

/s/ Cyrus E. Phillips IV
Signature of counsel

Cyrus E. Phillips IV
Printed name of counsel

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STATEMENT OF RELATED CASES

This is an Appeal from a Judgment entered by the United States Court of Federal Claims in a Post-Award Procurement Protest filed by Plaintiff-Appellant PAI Corporation (doing business as Professional Analysis), Oak Ridge, Tennessee (PAI Corporation). Plaintiff-Appellant PAI Corporation, a Small Business, there challenged an Award to Innovative Technology Partnerships LLC, Albuquerque, New Mexico (ITP) made by the U.S. Department of Energy's National Nuclear Security Administration Service Center, a tenant activity at Kirtland Air Force Base, Albuquerque, New Mexico (NNSA), an NNSA Service Center Award of a Cost Plus Award Fee (no Base Fee) Indefinite-Delivery/Indefinite-Quantity support services Task Order Contract for a base period of two years with two eighteen-month option periods.

The challenged Task Order Contract was set-aside for a Small Business or a Small Business-led team. The challenged Task Order Contract is a successor to a Master Contract wherein Wackenhut Services, Incorporated, Palm Beach Gardens, Florida (Wackenhut), a Large Business, has since 2003 delivered support services for NNSA Service Center's Office of Secure Transportation (OST). ITP is now teamed with Wackenhut. OST provides safe and secure transportation of nuclear weapons and

components and special nuclear materials. The total value of this successor, challenged OST support services Task Order Contract may not exceed $95,000,000; the guaranteed minimum under the challenged Task Order Contract is $3,000,000.

On September 24th, 2009, the United States Court of Federal Claims entered a Judgment denying Plaintiff-Appellant PAI Corporation's Motion for Judgment on the Administrative Record and granting NNSA Service Center's Cross-Motion for Judgment on the Administrative Record. This Judgment is supported by the Opinion and Order of the United States Court of Federal Claims (Senior Judge John P. Wiese) in *PAI Corporation v. United States, et al.,* No. 09-411C (Fed. Cl. Sept. 14th, 2009, reissued Sept. 17th, 2009), *2009 U.S. Claims LEXIS 320.*[1]

There are no Appeals in or from the same Civil Action known to counsel to have previously before this or any other appellate Court. There are no Cases known to counsel to be pending in this or any other Court that will directly affect, or be directly affected by, this Court's decision in this pending Appeal. FED. CIR. R. 47.5.

[1] Copies of the Judgment, page A, and the Nonconfidential Opinion and Order supporting the Judgment, pages B through V, are all attached as an Addendum. FED. CIR. R. 28(a)(12).

JURISDICTIONAL STATEMENT

On June 8th, 2009 the U.S. Department of Energy's NNSA Service Center awarded ITP and its Large Business teaming partner, Wackenhut, a five-year Cost Plus Award Fee (no Base Fee) Indefinite-Delivery/Indefinite-Quantity Task Order Contract to satisfy support service requirements of NNSA Service Center's OST. This follow-on Acquisition requires the delivery of training support services for the paramilitary instruction of OST Federal Agents, and this Acquisition likewise includes instruction, curriculum development, logistical management, property management, transportation of critical equipment, and other related technical and administrative support services. On June 17th, 2009 Plaintiff-Appellant PAI Corporation received an oral debriefing provided by NNSA's Service Center in accordance with 41 U.S.C. § 253b(e)-(1). *PAI Corporation, 2009 U.S. Claims LEXIS 3204, *11-*12.*

On June 23rd, 2009 Plaintiff-Appellant PAI Corporation filed with the United States Court of Federal Claims its Post-Award Procurement Protest Complaint, 28 U.S.C. § 1491(b)(1), there challenging the Award to ITP and Wackenhut, its Large Business teaming partner. NNSA's Service Center voluntarily stayed performance of

the successor OST support services Task Order Contract which NNSA's Service Center had awarded to ITP and Wackenhut, its Large Business teaming partner.

The Civil Action before the United States Court of Federal Claims proceeded on Cross-Motions for Judgment on the Administrative Record. On September 24th, 2009, the United States Court of Federal Claims entered a Judgment granting NNSA's Service Center's Cross-Motion for Judgment on the Administrative Record and denying Plaintiff-Appellant PAI Corporation's Motion for Judgment on the Administrative Record. This Judgment was preceded by a Confidential Opinion and Order of the United States Court of Federal Claims issued on September 14th, 2009. The United States Court of Federal Claims issued a Nonconfidential version of its Opinion and Order on September 17th, 2009.

Before the United States Court of Federal Claims Plaintiff-Appellant PAI Corporation argued that the Contracting Officer had exceeded her authority by concluding that appropriate safeguards were in place to eliminate a significant potential Organizational Conflict of Interest, this an "unequal access to information" Organizational Conflict of Interest, *without first obtaining approval* from the Chief of the Contracting Office before the Solicitation for the successor Task Order Contract was issued, this as required by Federal Acquisition Regulation 9.506(b)-(c).

*PAI Corporation, 2009 U.S. Claims LEXIS 320, *22-*23.* But the United States Court of Federal Claims held instead that Plaintiff-Appellant PAI Corporation had "over-read" the Federal Acquisition Regulation and that such Chief of the Contracting Office approval is required by the Federal Acquisition Regulation *only* if the Solicitation itself contains in the proposed Contract future "restraints" to correct the significant potential Organizational Conflict of Interest, and "not substantive adjustments to the content of the solicitation"—and since this particular Solicitation contained no such future restraints in the proposed Contract, Chief of the Contracting Office approval was not required before this Solicitation for a successor OST support services Task Order Contract was issued. *PAI Corporation, 2009 U.S. Claims LEXIS 320, *23-*24.*

The Judgment of September 24th, 2009 finally disposes of Plaintiff-Appellant PAI Corporation's Civil Action filed under 28 U.S.C. § 1491(b)(1). This Court has exclusive jurisdiction, under 28 U.S.C. § 1295(a)(3), of Appeals from final Decisions of the United States Court of Federal Claims. On September 30th, 2009 Plaintiff-Appellant PAI Corporation noticed its Appeal as of right from the Judgment of September 24th, 2009. 28 U.S.C. § 2522. This Appeal was timely docketed here on Oct-

ober 5th, 2009, FED. R. APP. P. 25(a)(1), well within sixty calendar days after entry of the Judgment, 28 U.S.C. § 2107(b).

STATEMENT OF THE ISSUES

- Did the United States Court of Federal Claims rightly decide that Chief of the Contracting Office approval was not required?

STATEMENT OF THE CASE

Rules for the identification and resolution of significant potential Organizational Conflicts of Interest are set out in Subpart 9.5, "Organizational and Consultant Conflicts of Interest," of the Federal Acquisition Regulation. Organizational Conflicts of Interest may arise from conflicting roles from one Contract to another Contract which might bias a Contractor's judgment, these so-called "impaired objectivity" Organizational Conflicts of Interest, Federal Acquisition Regulation 9.505(a), or they may arise when a Contractor obtains nonpublic information from other Contractors or from the Federal Government in the course of Contract performance, nonpublic information which could be useful when competing for a successor Contract, Federal Acquisition Regulation 9.505-4(a). This latter sort of Or-

ganizational Conflict of Interest is often referred to as an "unequal access to information" Organizational Conflict of Interest, and it is this latter sort of Organizational Conflict of Interest with which we are here concerned.

Federal Acquisition Regulation 9.504(a)(1) requires that Contracting Officers "[i]dentify and evaluate potential organizational conflicts of interest *as early in the acquisition process as possible*." (Emphasis added). Federal Acquisition Regulation 9.504(a)(2) requires that Contracting Officers "[a]void, neutralize, or mitigate significant *potential conflicts* before contract award." (Emphasis added). Federal Acquisition Regulation 9.506(b) requires that before a Solicitation is issued Contracting Officers shall analyze and document in writing a course of action to "avoid, neutralize, or mitigate" "*significant potential organizational conflict[s] of interest*." (Emphasis added). The key here is that these duties extend beyond *actual* conflicts—these duties require Contracting Officers to document a plan and then take action to avoid, neutralize, or mitigate *even apparent, or potential,* Organizational Conflicts of Interest *before* a Solicitation is issued.

And Contracting Officers are not authorized to take action on their own to avoid, neutralize, or mitigate significant potential Organizational Conflicts of Interest—such actions, whether they concern significant potential unequal access to

information Organizational Conflicts of Interest, or whether they concern significant potential impaired objectivity Organizational Conflicts of Interest, are required to be submitted for approval and approved by the Chief of the Contracting Office before a Solicitation is issued. Federal Acquisition Regulation 9.506(b)-(c). Contracting Officer actions which have been so approved by the Chief of the Contracting Office may be included in the Solicitation, in the proposed Contract, or in both documents. Federal Acquisition Regulation 9.506(d)(1).

Case law teaches that an unequal access to information Organizational Conflict of Interest arises: (i) when an Awardee has had access to nonpublic information that was unavailable to the Protester; (ii) that nonpublic information is competitively useful in responding to a Solicitation; (iii) by having such unequal access the Awardee was afforded an advantage that was unfair, and (iv) not having access to this nonpublic information prejudiced the Protester, i.e., whether or not the Protester's Competitive Proposal had other deficiencies that rendered the lack of access to this nonpublic information inconsequential. *ARINC Engineering Services, LLC v. United States*, 77 Fed. Cl. 196, 202-203 (2007).

Agencies need not generally forego the benefits of incumbency. Nonetheless, it is required of Contracting Officers that they negate the competitive advantage of

Awardees who have become so embedded as to provide them with insight into Agency operations "beyond that which would be expected of a typical government contractor." *Id.*, at 203. This sort of situation exists when Awardees have access to more detailed information about the Acquisition than that which is available in the public domain. *Alabama Aircraft Industries, Inc. v. United States*, 83 Fed. Cl. 666, 668 (2008).

Here ITP, a Small Business, teamed with the incumbent Wackenhut, a Large Business. *PAI Corporation, 2009 U.S. Claims LEXIS 320, *7.* Wackenhut, the incumbent OST support services Task Order Contractor, had had access to nonpublic information which resulted from this OST support services Task Order Contract performance, this including access to specific nonpublic processes/procedures developed to assess/monitor OST Federal Agent training and performance. *PAI Corporation, 2009 U.S. Claims LEXIS 320, *15-*16, n.6.*

Here ITP was the incumbent audits/assessments Contractor for OST's Program Office of Independent Oversight from October 1st, 2003 through May 31st, 2009 and as the incumbent audits/assessments Contractor, ITP's subject matter experts had provided audits and assessments of OST training activities and the performances of other OST Contractors, including Wackenhut. ITP had had access under this

Program Office of Independent Oversight Contract to nonpublic details of just how Wackenhut or other OST Contractors performed particular work or a Task Order. Likewise, ITP's involvement as an auditor of operational readiness training had given ITP access to nonpublic information regarding the OST training program. *PAI Corporation, 2009 U.S. Claims LEXIS 320, *11, n.3.*

It turns out that even before this Solicitation for a successor OST support services Task Order Contract was issued, a potential Offeror had likewise complained about the unequal access to information Organizational Conflict of Interest that would be garnered by any Small Business which teamed with Wackenhut, the incumbent Large Business, and in response the Contracting Officer had modified Solicitation requirements which would be used to evaluate the Competitive Proposals of the competing Small Business Offerors (she substituted three sample Task Orders in place of a broader evaluation scheme). *PAI Corporation, 2009 U.S. Claims LEXIS 320, *19-*22.* But the Contracting Officer did not, as required Federal Acquisition Regulation 9.506(b), analyze and document her actions, and neither did the Contracting Officer submit her analysis and obtain the approval of the Chief of the Contracting Office, as required by Federal Acquisition Regulation 9.506(b)-(c), before issuing the Solicitation for the successor OST support services Task Order Contract.

NNSA's Service Center first awarded the successor OST support services Task Order Contract to ITP and Wackenhut, its Large Business teaming partner, on December 29th, 2008. This resulted in yet another complaint about the unequal access to information Organizational Conflict of Interest involving both ITP and Wackenhut, this a Post-Award Procurement Protest filed with the United States Government Accountability Office (GAO) on January 12th, 2009. NNSA's Service Center thereafter promised to take corrective action, to document its findings, and to issue a new Source Selection Decision. The GAO Post-Award Procurement Protest was dismissed on February 19th, 2009. *PAI Corporation, 2009 U.S. Claims LEXIS 320, *7-*8.*

In response to its promise to GAO, NNSA's Service Center made no revisions to the Technical, Key Personnel, Corporate Experience, and Past Performance scores which had been recorded the previous December, although it did adjust, for cost realism purposes, the total probable cost it had established for the three sample Task Orders, and in doing so, NNSA's Service Center increased ITP's probable cost by seventy percent, this to reflect the current average labor rates which ITP would be paying when ITP would hire (as ITP had promised in its Competitive Proposal) the incumbent Wackenhut staff upon award of the successor OST support services Task Order Contract. *PAI Corporation, 2009 U.S. Claims LEXIS 320, *8-*10, *12.*

The NNSA Service Center Source Selection Authority again selected ITP and Wackenhut, its Large Business teaming partner, on June 4th, 2009. On June 8th, 2009, and this time in response to the January 2009 GAO Post-Award Procurement Protest, the Contracting Officer, for the first time, analyzed and documented her previous actions concerning the unequal access to information Organizational Conflict of Interest issue which had been raised both before the Solicitation was issued in August 2008, and again in January 2009 when the successor OST support services Task Order Contract awarded in December 2008 to ITP and Wackenhut, its Large Business teaming partner, was challenged before GAO.

The Contracting Officer concedes in this June 2009 document that both ITP and Wackenhut had had access to nonpublic information through their existing Contracts with NNSA's Service Center (Wackenhut, a Large Business, had held the predecessor Master Contract for OST support services, and ITP had been the incumbent audits/assessments Contractor for OST's Program Office of Independent Oversight). But the Contracting Officer took no new actions in June 2009 beyond those she had already taken in July 2008. And now, this after ITP and Wackenhut, its Large Business teaming partner, had again been selected for award of the successor OST support services Task Order Contract, the Contracting Officer concluded that this "nonpublic

information had no competitive value in the instant procurement." *PAI Corporation, 2009 U.S. Claims LEXIS 320, *11, *15-*16.*

This time the Contracting Officer, as required by Federal Acquisition Regulation 9.506(b), had analyzed and documented her actions, albeit long after the Solicitation for a successor Task Order Contract was issued, but still the Contracting Officer did not submit her analysis and obtain the approval of the Chief of the Contracting Office for her actions and her conclusions, this as required by Federal Acquisition Regulation 9.506(b)-(c).

When it looked only at the absence of any future restraints in the proposed Contract (per the United States Court of Federal Claims, the propriety of such future restraints is the *only* instance where Chief of the Contracting Office approval is required), and ignored this Contracting Officer's unapproved adjustments of July 2008 to the contents of the Solicitation for the successor OST support services Task Order Contract, the United States Court of Federal Claims eviscerated the Federal Acquisition Regulation's command that Contracting Officers avoid, neutralize, or mitigate *both* significant potential unequal access to information Organizational Conflicts of Interest *and* significant potential impaired objectivity Organizational Conflicts of Interest—while impaired objectivity Organizational Conflicts of Interest are normally

resolved by imposing some sort of future restraint in the proposed Contract, this as recognized by Federal Acquisition Regulation 9.507-1, unequal access to information Organizational Conflicts of Interest are resolved by adjustments to the Solicitation as it is being competed, here per Federal Acquisition Regulation 9.506(d)(1).

These Solicitation adjustments of July 2008 were not approved by the Chief of the Contracting Office before the Solicitation for the successor OST support services Task Order Contract was issued, and neither were these year-old Solicitation adjustments, nor the Contracting Officer's later conclusion that the nonpublic information to which ITP had had access "had no competitive value," approved by the Chief of the Contracting Office as a part of the corrective action promised to GAO by NNSA's Service Center. Indeed, the Contracting Officer has never completed the promised corrective action. The effect, if it was not the intent, of the Contracting Officer's actions and inactions here have been to convey, management and incumbents both, the existing OST support services Task Order Contract Wackenhut enterprise into the hands of ITP and Wackenhut, its Large Business teaming partner.

STATEMENT OF THE FACTS

The Parties.

Plaintiff-Appellant PAI Corporation is a Tennessee corporation and a Small Woman-Owned Business with twenty-five years of experience providing support services nationwide to the nuclear complex of the U.S. Department of Energy's NNSA. Plaintiff-Appellant PAI Corporation is currently performing contracts in nuclear safeguards and security at the Y-12 National Security Complex, the Nevada Test Site, and the Oak Ridge Reservation. A0313.

ITP, a Small Business, has teamed with Wackenhut, a Large Business. A0436 through A0437. ITP's teaming agreement with Wackenhut was initiated early in 2007. A0279. ITP had a commitment from Wackenhut's Deputy General Manager to serve as ITPs' Program Manager. A0525. ITP had a commitment from Wackenhut's Assistant General Manager for Logistics to serve as ITPs' Logistics Program Manager. A528. ITP had a commitment from Wackenhut's Assistant General Manager for Training to serve as ITPs' Training Program Manager. A531.

ITP was the incumbent audits/assessments Contractor for OST's Program Office of Independent Oversight from October 1st, 2003 through May 31st, 2009. A0694

through A0696. ITPs' subject matter experts provided audits and assessments of OST training activities, including operational readiness training, professional controller force/evaluator, and Opposition Force. ITP conducted audits of other OST Contractors including Wackenhut, and ITP had had access to the details of just how Wackenhut or other OST Contractors performed particular work or a Task Order. Likewise, ITPs' involvement as an auditor of operational readiness training gave ITP access to nonpublic information regarding the OST training program. A0703.

Wackenhut was then the incumbent OST support services Task Order Contractor; Wackenhut held NNSA Service Center Master Contract Number DE-AM04-03AL67577 and performance of this Master Contract began on August 18th, 2003. NNSA's Service Center awarded eight Task Orders under this Master Contract with a total value over $100,000,000. A0549 through A0558. Wackenhut had had access to nonpublic information due to its performance as the incumbent OST support services Task Order Contractor, including the OST Playbook and the OST Lesson Plans. The nonpublic OST Playbook contains processes/procedures specifically developed to assess/monitor OST Federal Agent performance. The nonpublic OST Lesson Plans contain the details of OST Agent Candidate Training (ACT). A0697 through A0699.

The Acquisition.

NNSA's Service Center OST Support Services Solicitation Number DE-RP52-08-NA28558 sought a Small Business or a Small Business-led team to perform the successor to the Wackenhut Master Contract. The estimated ceiling amount of this promised five-year Task Order Contract is $95,000,000. This follow-on Acquisition requires the delivery of training support services for the paramilitary training of OST Federal Agents, and this Acquisition likewise includes instruction, curriculum development, logistical management, property management, transportation of critical equipment, and other related technical and administrative support services. The successor Small Business prime Contractor will provide training support services to include Agent Candidate Training (ACT) at the Transportation Safeguards Training Site, Fort Chaffee, Arkansas; Operational Readiness Training (ORT), Special Response Force (SRF) Training, and support for other specialized OST Federal Agent training; OST logistics; property management and munitions support; OST Federal Agent support at Agent Operation Commands; and support services for the OST mission, these in Albuquerque, New Mexico; Oak Ridge, Tennessee; Amarillo, Texas; and at Department of Energy Headquarters in Washington, D.C. A0691 through A0692.

The Solicitation for a successor OST support services Task Order Contract, Solicitation Number DE-AC52-08NA28558 was issued by NNSA's Service Center on August 29th, 2008 and it was a Solicitation for Competitive Proposals which promised an Award, a Cost Plus Award Fee (no Base Fee) Indefinite-Delivery/Indefinite-Quantity Task Order Contract for a base period of two years from date of Task Order Contract Award with two eighteen-month option periods. A0050, A0087. The ordering period for the promised Task Order Contract is not to exceed five years. A0050. The total Task Order Contract value is a not-to-exceed $95,000,000. A0045. This is also the maximum dollar amount that NNSA's Service Center can order under the successor OST support services Task Order Contract; the guaranteed minimum amount of the promised successor OST support services Task Order Contract is $3,000,000. A0046.

Announced Technical and Management Evaluation Criteria.

The very first Technical and Management evaluation Criterion set out in the NNSA's Service Center Solicitation Number DE-AC52-08NA28558 for a successor OST support services Task Order Contract was to be a review of each Offeror's response to three sample Task Orders, i.e., an evaluation of each Offeror's "Technical Approach to Task Orders." A0093. The first sample Task Order was "Conduct Agent Candidate Training (ACT) for CY [Calendar Year] 2009." The second sam-

ple Task Order was "Support Operational Readiness Training (ORT) Events for CY 2009." The third sample Task Order was for three different Scenarios under the "Contractor Transportation and Utilization Program (CTUP)," wherein an Offeror would provide personnel to move vehicles between OST facilities. Each Scenario was to take place either in January, in February, or in March 2009. A0227 through A0237.

These three sample Task Orders were substantially similar to actual Task Orders previously issued under the Wackenhut Master Contract. For instance, the ITP Competitive Proposal explained that the Conduct Agent Candidate Training (ACT) for CY 2009 sample Task Order had been performed under the Wackenhut Master Contract "for the past two years." A0445. The same is true for the Support Operational Readiness Training (ORT) Events for CY 2009 sample Task Order. A0465. Indeed, Solicitation Number DE-AC52-08NA28558 announced that it "is anticipated that the Conduct Agent Candidate Training and the Support Operational Readiness Training Task Orders will be awarded concurrently with the Master Contract." A0101. Simply put, two of these three sample Task Orders are for yearly recurring OST training requirements and the third sample Task Order is for yearly recurring OST operational requirements.

The second announced Technical and Management evaluation Criterion was for three proposed Key Personnel. Offerors were to name three Key Persons: a Program Manager, a Logistics Program Manager, and a Training Program Manager. A0093.

The third announced Technical and Management evaluation Criterion was to be Corporate Experience and the fourth announced Technical and Management evaluation Criterion was to be Past Performance. A0094.

The Promised Cost Evaluation.

Offerors were required to submit a Cost Proposal for the three sample Task Orders. A0095. The three sample Task Orders were to be separately priced and each was to include estimated direct productive labor hours (DPLH), direct labor rates, indirect rates, travel and other direct Costs (ODC), and Award Fee (the proposed prime Task Order Contractor's highest Award Fee rate, expressed as a percentage of total Costs (excluding travel, ODC's, facilities capital Cost of money, and New Mexico Gross Receipts tax)). A0096 through A0097.

The Evaluation Plan.

There was to be a "Best Value" Selection Decision. Technical Approach to Task Orders, Key Personnel, and Corporate Experience were all of equal importance and each was more important than Past Performance. When combined, these four an-

nounced evaluation Criterions were significantly more important than Cost. A0107.

The First Award to ITP and Wackenhut.

On December 22nd, 2008 the Source Selection Authority selected ITP and its Large Business teaming partner, Wackenhut, for Award of the successor OST support services Task Order Contract. The Contracting Officer issued the successor OST support services Task Order Contract to ITP and its Large Business teaming partner, Wackenhut, on December 29th, 2008. A0694.

The First Post-Award Procurement Protest.

Advanced Technologies and Laboratories International, Incorporated, Germantown, Maryland (ATL) on January 12th, 2009 protested this first Award to ITP and its Large Business teaming partner, Wackenhut, by timely filing a Post-Award Procurement Protest with GAO. A0596. ATL challenged the unfair competitive advantage created through unequal access to information when the Contracting Officer had selected three sample Task Orders to be used for the evaluation of Competitive Proposals, sample Task Orders which Wackenhut, a Large Business, had already performed and for which Wackenhut had detailed technical and actual Cost information that it could share with its Small Business teaming partner, ITP. Likewise, ATL complained

that as the incumbent audits/assessments Contractor for OST's Program Office of Independent Oversight, ITP had had access to the details of just how Wackenhut or other OST Contractors performed particular work or a Task Order. A0600 through A0603.

The Promised Corrective Action.

On February 17th, 2009 house counsel for NNSA's Service Center wrote GAO that NNSA's Service Center would take corrective action:

> NNSA will be clarifying, and resolving where appropriate, the organizational conflicts of Interest issues raised in the protest, review the cost realism evaluation, review the past performance issues raised in the protest, and if appropriate conduct discussions. NNSA will take all appropriate steps to document these matters. The corrective action will result in a new source selection decision.

A0616. This NNSA Service Center procurement Decision rendered the ATL Post-Award Procurement Protest moot. On February 19th, 2009 ATL withdrew its filings. A0694. On March 20th, 2009 NNSA's Service Center requested extensions of the period for acceptance of the initial Competitive Proposals in order to allow "time to clarify and resolve, where appropriate, the issues raised in the [ATL] protest regarding organizational conflicts of interest, cost realism and past performance." A0617.

It turned out that all of the technically acceptable initial Competitive Proposals had received perfect scores on the Past Performance evaluation Criterion. A0681. And after a review of Department of Energy Inspector General Reports for all of the proposed Small Business prime Contractors and their teaming partners, the evaluators found no additional current and relevant Past Performance information—so the perfect scores on the Past Performance evaluation Criterion were not changed. A0682. There were no Discussions and no initial Competitive Proposal was modified by any Offeror. Indeed, there were no changes to any of the discrete scores recorded on the four Technical and Management evaluation Criteria. A0681.

The Contracting Officer made her first written analysis of Organizational Conflicts of Interest on June 8th, 2009. A0691 through A0703. Concerns about unequal access to information Organizational Conflicts of Interest had been apparent as early as April 8th, 2008 when NNSA's Service Center adopted a Source Acquisition Plan and there had anticipated that ITP and Plaintiff-Appellant PAI Corporation, both Small Businesses, would compete for the successor OST support services Task Order Contract and that ITP would team with the incumbent Large Business OST support services Task Order Contractor, Wackenhut. A0279.

ATL's Post-Award Procurement Protest of January 12th, 2009 was not the first time that unequal access to information Organizational Conflict of Interest concerns had been raised—on July 11th, 2008 Global Engineering & Technology, Incorporated, Coral Gables, Florida (GET) had complained that any Small Business which teamed with Wackenhut would have an unfair competitive advantage based on unequal access to information—Wackenhut's knowledge of the necessary staffing levels for particular Task Orders, had been coupled with the Contracting Officer's steadfast refusals to divulge Wackenhut's personnel staffing levels—the Contracting Officer was claiming that it was the Small Business Offerors' responsibility to propose the staffing levels required to accomplish the requirements of the Performance Work Statement. A0692. Apparently, GET was unaware that as the incumbent audits/assessments Contractor for OST's Program Office of Independent Oversight, ITP had had its own access to the details of just how Wackenhut or other OST Contractors performed particular work or a Task Order. A0695.

The Contracting Officer's response to the unequal access to information Organizational Conflict of Interest complaint filed by GET was to publish, when Solicitation Number DE-AC52-08NA28558 was issued on August 29th, 2008, a year-long schedule of direct productive labor hours incurred by Wackenhut for each of the sixteen

separate and discrete Task Areas set out in the Performance Work Statement, and this by location, but these denoted only by "check" marks. Likewise, the Contracting Officer published an "estimated" training calendar for OST, this from December 2008 to December 2009. A0692. But no prospective Small Business Offeror could have discerned from this year-long schedule of direct productive labor hours incurred by Wackenhut for each of the sixteen separate and discrete Task Areas just how these direct productive labor hours were allocated to particular Task Orders, or distributed to particular sites (i.e., to an Agent Operation Command or to the Transportation Safeguards Training Site, Fort Chaffee, Arkansas).

In her written analysis of Organizational Conflicts of Interest on June 8th, 2009, the Contracting Officer admits that she became aware only in late December 2008 that as the incumbent audits/assessments Contractor for OST's Program Office of Independent Oversight, ITP had had its own access to the details of just how Wackenhut or other OST Contractors performed particular work or a Task Order. A0693.

This is what the Contracting Officer says about this particular unequal access to information Organizational Conflict of Interest for ITP which had occurred to her only in late December 2008, this after the Solicitation for a successor OST support services Task Order Contract has been issued in August of that year:

[

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A0695 (Emphasis added). It turns out, of course, that two of the three sample Task Orders, sample Task Orders substituted for evaluation purposes by the Contracting Officer in place of a broader evaluation scheme, are for yearly recurring OST training requirements. And there was nothing in the Administrative Record before the United States Court of Federal Claims from which one could judge just how much, or how frequently, these "scenarios and exercises" might change, if, indeed, they change at all.

The Unremedied Informational Deficiencies.

The lower score given Plaintiff-Appellant PAI Corporation on the Technical Approach to Task Orders evaluation Criterion in the fall of 2008 resulted from the Contracting Officer's authorship of sample Task Order 3.[2] The Contracting Officer explained in June 2009 that for sample Task Order 3, i.e., three different Scenarios under the "Contractor Transportation and Utilization Program (CTUP):"

> not only did I provide offerors with very specific information for three fictitious transportation scenarios, I provided offerors information regarding the number of drivers and transportation assets needed to complete each scenario as well as trip duration and locations.

A0693.

Contrast this sample Task Order 3 and the detailed information provided by the Contracting Officer for sample Task Order 3 with sample Task Order 1, "Conduct Agent Candidate Training (ACT) for CY [Calendar Year] 2009," and with sample

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[2] Plaintiff-Appellant PAI Corporation received its lowest score, eighty percent of three-hundred available points, on the Technical Approach to Task Orders evaluation Criterion; on the Key Personnel evaluation Criterion, Plaintiff-Appellant PAI Corporation received ninety-three percent of three-hundred available points; on the Corporate Experience evaluation Criterion, Plaintiff-Appellant PAI Corporation received eighty-seven percent of three-hundred available points; and on the Past Performance evaluation Criterion, Plaintiff-Appellant PAI Corporation (and the other Offerors whose initial Competitive Proposals were technically acceptable) received one-hundred percent of the one-hundred available points. A0657.

Task Order 2, "Support Operational Readiness Training (ORT) Events for CY 2009." As it turns out, sample Task Order 1 and sample Task Order 2 are yearly, re-curring training events which are conducted several times each year by ITPs' Large Business teaming partner, Wackenhut. A0445, A0465.

Now look at the rating of Plaintiff-Appellant PAI Corporation's initial Competitive Proposal on the Technical Approach to Task Orders Criterion—here, it is obvious that Plaintiff-Appellant PAI Corporation's response to sample Task Order 3 was significantly better received than Plaintiff-Appellant PAI Corporation's response to sample Task Order 1, or to sample Task Order 2—there are no weaknesses, or significant weaknesses, observed for Plaintiff-Appellant PAI Corporation's response to sample Task Order 3, and this is the sample Task Order where the Contracting Officer, in her own words, had provided "very specific information" which she did not provide for sample Task Order 1 or for sample Task Order 2. A0657 through A0660.

These lower scores are the result of the unremedied informational deficiencies in sample Task Order 1 and in sample Task Order 2, and they reveal the ready availability of a cure for these informational deficiencies, the "very specific information" provided by the Contracting Officer for sample Task Order 3. Had the Chief of the

Contracting Office directed in July 2008, as well he could have, that this sort of information must be provided as well for sample Task Order 1 and for sample Task Order 2, there would not have been an unequal access to information Organizational Conflict of Interest. But this was not to be.

SUMMARY OF THE ARGUMENT

The problem with the United States Court of Federal Claims' affirmance of this procurement Decision of the Contracting Officer is that it is "otherwise not in accordance with law," that is, this procurement Decision violates the clear command of Federal Acquisition Regulation 9.506(b)-(c) because this procurement Decision of the Contracting Officer was never submitted for approval and approved by the Chief of the Contracting Office.

Contrary to the holding of the United States Court of Federal Claims, Chief of the Contracting Office approval is required *both* for Contracting Officer actions which address significant potential unequal access to information Organizational Conflicts of Interest *and* for Contracting Officer actions which address significant potential impaired objectivity Organizational Conflicts of Interest. Chief of the Contracting Office approval is not limited to *only* those Contracting Officer actions

which impose future restraints in the proposed Contract. This is confirmed by the Federal Acquisition Regulation because Contracting Officer actions which have been reviewed and approved by the Chief of the Contracting Office may be included in the Solicitation, in the proposed Contract, or in both documents. Federal Acquisition Regulation 9.506(d)(1).

ARGUMENT

I. Standard of Review.

This Court's review of final Decisions of the United States Court of Federal Claims on grant or denial of Motions for Judgment on the Administrative Record is de novo, without deference. *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1108 (Fed. Cir. 2004). Inquiry here about the legal issue of a Contracting Officer's conduct is whether the challenged procurement Decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed. Cir. 2005). Factual findings made by the United States Court of Federal Claims from an extant Administrative Record are reviewed in this Court for clear error. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1312 (2007).

II. The United States Court of Federal Claims Wrongly Concluded That Chief of the Contracting Office Approval Was Not Required.

The situation here is much the same situation which existed, a situation which was remedied after a Post-Award Procurement Protest, in *Johnson Controls World Services, Inc.*, B-286714.2, February 13th, 2001, *2001 U.S. Comp. Gen. LEXIS 1*. There one of the Offerors, the incumbent, had had access to nonpublic information—detailed work order information—that was not available to the other Offerors and would enable one to "refine and reduce staffing levels significantly beyond what would be possible using the [Solicitation] information alone," nonpublic information which "could be useful in determining the nature of the work performed in far greater detail than would be possible otherwise." *Id., 2001 U.S. Comp. Gen. LEXIS 1, *12 through *13.*

Because the *Johnson Controls World Services* Contracting Officer took no action to mitigate this unfair competitive advantage, *Id., 2001 U.S. Comp. Gen. LEXIS 1, *18 through *19,* GAO sustained the Post-Award Procurement Protest which was before it and disqualified the incumbent from the Competition, *Id., 2001 U.S. Comp. Gen. LEXIS 1, *29.*

Here the Contracting Officer has taken action to neutralize or mitigate the significant potential unequal access to information Organizational Conflict of Interest garnered by ITP, but the problem is that these actions of the Contracting Officer have not been approved, as required by Procurement Regulation, by the Chief of the Contracting Office.

The United States Court of Federal Claims has previously addressed Contracting Officer failure to obtain Chief of the Contracting Office approval when a Contracting Officer takes action to neutralize or mitigate an Organizational Conflict of Interest. The Case is *Filtration Development, LLC v. United States*, 60 Fed. Cl. 371 (2004), and *Filtration Development* concerned an Army procurement of inlet barrier filters to trap ingested Iraqi sand for the UH-60 Black Hawk four-bladed, twin engine, medium-lift utility helicopter, *Id.*, 60 Fed. Cl., at 373. A Competitor seeking to provide inlet barrier filters for the UH-60 filed a Post-Award Procurement Protest with the United States Court of Federal Claims, there contending that the Army had failed to obtain Chief of the Contracting Office approval of a Contracting Officer's action to mitigate an impaired objectivity Organizational Conflict of Interest. *Id.*, 60 Fed. Cl., at 377.

The United States Court of Federal Claims agreed, holding that the Contracting Officer's actions seeking to eliminate the impaired objectivity Organizational Conflict of Interest were "not a decision the CO is empowered to make." *Id*., 60 Fed. Cl., at 378. Most importantly to this Civil Action, the *Filtration Development* Court held that prejudice resulting from these unapproved Contracting Officer actions seeking to resolve an impaired objectivity Organizational Conflict of Interest was to be presumed:

> Plaintiff is, therefore, entitled to benefit from the presumption of harm/prejudice. *Id. at 12* (citing *NFK Eng'g, Inc. v. United States, 805 F.2d 372, 376 (Fed. Cir. 1986)*, *Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990)*, *aff'd*, *960 F.2d 157 (Fed. Cir. 1992))*; see also *Matter of: DZS/Baker LLC, 1999 U.S. Comp. Gen. LEXIS 16, B-281224, 99-1 CPD P 19, at 7, 1999 WL 46706, at *4 (Comp. Gen. Jan. 12, 1999)* ("We note that there is a presumption of prejudice . . . where a conflict of interest, other than a de minimis or insignificant matter is not resolved."). Although defendant maintains that the presumption can be rebutted through the implementation of adequate safeguards, the argument loses its persuasiveness given the court's conclusion concerning Westar's mitigation plans. *While the court does not question the credibility or integrity of Westar to voluntarily comply with the recommended precautionary measures, the court cannot allow an unsigned and unapproved mitigation plan to stand. Therefore, a presumption of harm to the procurement process and prejudice accompanies Westar's dual role.*

Filtration Development, 60 Fed. Cl., at 379 (Emphasis added).

Filtration Development is not inapposite because it involved an impaired objectivity Organizational Conflict of Interest rather than an unequal access to information Organizational Conflict of Interest. Instead, what is crucial is that there, as here, a Contracting Officer's actions to avoid or neutralize an Organizational Conflict of Interest were not approved by the Chief of the Contracting Office as is required by Federal Acquisition Regulation 9.506(b)-(c).

The United States Court of Federal Claims has held that in such circumstances, the United States Court of Federal Claims "cannot allow an unsigned and unapproved mitigation plan to stand." So too here. This Contracting Officer's unapproved adjustments of July 2008 to the contents of the Solicitation for the successor OST support services Task Order Contract are unlawful, and these unapproved Contracting Officer adjustments have prejudiced Plaintiff-Appellant PAI Corporation.

The unremedied informational deficiencies in sample Task Order 1 and in sample Task Order 2 could have been remedied in July 2008 had the Chief of the Contracting Office directed the Contracting Officer to provide "very specific information" of the sort provided by the Contracting Officer for sample Task Order 3. Had the Chief of the Contracting Office done this in July 2008, as well he could have, there would not have been an unequal access to information Organizational Con-

flict of Interest. But this was not to be. And so now, just as per *Filtration Development*, the Contracting Officer's unapproved actions cannot stand.

This particular Source Selection, this Award, violates Federal Acquisition Regulation 9.506(b)-(c) and therefore the challenged, successor OST support services Task Order Contract awarded by NNSA's Service Center to ITP and Wackenhut, its Large Business teaming partner, is not "rational" as is defined by 5 U.S.C. § 706-(2)(A), (D). This challenged, successor OST support services Task Order Contract is in violation of Procurement Regulation.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The United States Court of Federal Claims has eviscerated the Federal Acquisition Regulation's command that Contracting Officers avoid, neutralize, or mitigate *both* significant potential unequal access to information Organizational Conflicts of Interest *and* significant potential impaired objectivity Organizational Conflicts of Interest. The Contracting Officer's procurement Decision challenged here is a clear violation of law, *viz*. Federal Acquisition Regulation 9.506(b)-(c).

For all these reasons, Plaintiff-Appellant PAI Corporation requests that this Court hold that the United States Court of Federal Claims has committed legal er-

ror, and that this Court remand this Post-Award Procurement Protest to the United States Court of Federal Claims with a direction to enter Judgment for Plaintiff-Appellant PAI Corporation and to enjoin NNSA's Service Center from exercising the available options under the challenged OST support services Task Order Contract which has been unlawfully awarded to ITP and Wackenhut, its Large Business teaming partner.

Respectfully submitted,

/s/ Cyrus E. Phillips IV

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PAI Corporation.

Addendum

In the United States Court of Federal Claims

No. 09-411 C

PAI CORPORATION,
Plaintiff,

v.

THE UNITED STATES,
Defendant,
and

INNOVATIVE TECHNOLOGY PARTNERSHIPS, LLC,
Defendant-Intervenor.

JUDGMENT

Pursuant to the court's Opinion, filed September 14, 2009, denying plaintiff's motion for injunctive relief and granting defendant's and defendant-intervenor's cross-motions for judgment on the administrative record,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

John S. Buckley
Acting Clerk of Court

September 24, 2009 By: s/Lisa L. Reyes

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

In the United States Court of Federal Claims

No. 09-411C
Filed: September 14, 2009
Reissued: September 17, 2009[*/]

PAI CORPORATION,	)	Post-Award Bid Protest: A motion for a permanent injunction will not be granted where the contracting officer adequately addressed any potential organizational conflicts of interest and where plaintiff failed to show that either the agency's inclusion of subcontractors in its evaluation of corporate experience or the agency's cost realism analysis was arbitrary or capricious.
Plaintiff,	)	
v.	)	
THE UNITED STATES,	)	
Defendant,	)	
and	)	
INNOVATIVE TECHNOLOGY PARTNERSHIPS, LLC,	)	
Defendant-Intervenor.	)	**REDACTED VERSION**

Cyrus E. Phillips IV, Arlington, Virginia, counsel for plaintiff.

Jane C. Dempsey, with whom were Assistant Attorney General Tony West, Director Jeanne E. Davidson, and Assistant Director Martin

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[*/] The court originally issued this order under seal on September 14, 2009, pursuant to the protective order entered in this case on June 26, 2009. After a review of the redactions proposed by the parties, the court is reissuing a redacted version of the order in conformance with the E-Government Act of 2002.

F. Hockey, Jr., U.S. Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, counsel for defendant. Don Crocket and Anh Nguyen, U.S. Department of Energy, of counsel.

Richard J. Webber, Arent Fox LLP, Washington, DC, counsel for defendant-intervenor. Lisa K. Miller and Kavitha J. Babu, of counsel.

OPINION

WIESE, Judge.

Plaintiff, PAI Corporation, a disappointed bidder in a procurement for nuclear-transport training support services, sues here to set aside the award of a contract to Innovative Technology Partnerships, LLC ("ITP"), the intervenor in this action, by the United States Department of Energy ("DOE"). Plaintiff contends that DOE's decision to award the contract to ITP was arbitrary and capricious because DOE failed to mitigate ITP's allegedly unfair competitive advantage resulting from ITP's access to nonpublic information through its subcontractor Wackenhut Services, Inc. ("Wackenhut") and through its own performance as the incumbent contractor for DOE's Program Office of Independent Oversight ("the POIO contract"). Plaintiff additionally alleges that the award was arbitrary and capricious because DOE impermissibly considered the corporate experience of the various subcontractors and incorrectly evaluated plaintiff's cost proposal.

The case is now before the court on the parties' cross-motions for judgment on the administrative record. The parties have fully briefed the issues and the court heard oral argument on August 26, 2009. At the conclusion of the argument, the court announced a tentative ruling in defendant's favor but explained that it would further study the record in light of the arguments presented before issuing a final decision. For the reasons set forth below, we now affirm our earlier ruling and grant defendant's and defendant-intervenor's cross-motions for judgment on the administrative record.

FACTS

DOE's Office of Secure Transportation ("OST"), a division of DOE's National Nuclear Security Administration, is responsible for the safe and secure transport of nuclear weapons, special nuclear materials, and weapon components between production facilities and Department of Defense facilities via ground and air transportation. In support of this mission, DOE issued a solicitation on August 29, 2008, to provide training support services to OST for a range of operational and administrative activities. The solicitation called for an indefinite-delivery, indefinite-quantity, cost-plus-award-fee type contract for a base period of two years, with two 18-month option periods. The guaranteed minimum under the contract was $3 million with an estimated ceiling of $95 million. Although the incumbent contractor for the support services contract, Wackenhut, was a large business concern, DOE limited the instant procurement to small businesses.

As part of the solicitation, offerors were instructed to submit a cost proposal for three sample task orders to enable DOE to determine whether the "proposed costs are reasonable, realistic, and reflect a clear understanding of the solicitation requirements." The first sample task order directed offerors to "Conduct Agent Candidate Training for [Calendar Year] 2009." The second sample task order further instructed offerors to "Support Operational Readiness Training for [Calendar Year] 2009." The third sample task order provided offerors with three different scenarios under the "Contractor Transportation and Utilization Program" and required offerors to provide personnel to move vehicles between OST facilities. Offerors were directed to price each of the sample task orders separately and to include estimated direct productive labor hours, direct labor rates, indirect rates, travel and other direct costs, and an award fee as part of their cost proposal.

The solicitation provided that a cost realism analysis would be used to establish each offeror's total probable cost for the best value evaluation. The total probable cost was defined as the sum of the probable cost for the three sample task orders and a total award fee.

Offerors were additionally informed that DOE, in conducting its cost realism analysis, might adjust an offeror's proposed costs to reflect any additions or reductions in cost elements to realistic levels.[2/]

The solicitation contained a Source Evaluation Plan setting forth the procedures for DOE's evaluation of proposals. Pursuant to these procedures, DOE established an Integrated Project Team consisting of the contracting officer, a technical representative, and a legal advisor, who in turn were supported by technical advisors, business advisors, and "ex-officio" members. Under the Source Evaluation Plan, the technical representative was charged with evaluating the proposals with respect to their technical approach, key personnel, corporate experience, and past performance, including identifying strengths, weaknesses, deficiencies, and risks in each of those areas. The contracting officer was in turn given responsibility for evaluating each offeror's cost proposal, including conducting a cost realism analysis for each bid. Following the Project Team's evaluation, the technical representative was required to brief the contracting officer and the Source Selection Authority on the results of the evaluation without making any recommendation for award.

On July 30, 2008, one month before the issuance of the solicitation, DOE launched the OST Support Services Contract website which provided links titled "Reading Room," "Questions and Answers," and "Miscellaneous." Through these links, offerors could obtain information about the upcoming OST support services procurement. In "Reading Room," DOE publicly released the existing OST support services contract being performed by Wackenhut, including the contract's Performance Work Statement. In addition, the "Reading Room" link also provided documents and information from DOE's Industry Day conference, including the attendance roster, the briefing

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[2/] As explained in its "Technical Evaluation of Cost," DOE first developed a baseline for staffing and other direct costs specific to each task order. This baseline was created using the expert judgments of a technical representative and OST technical advisors who relied upon their direct working knowledge of OST requirements applicable to the three sample task orders as well as historical data. DOE used this baseline in the cost realism analysis as an objective standard against which it could measure the realism of each offeror's proposed costs.

packages explaining the OST command structure, mission, and logistics and property management, documents addressing federal agent readiness training in the areas of Agent Candidate Training and Operation Readiness Training, and the results of a question-and-answer session.

Nine offerors, including plaintiff and ITP, submitted timely proposals. In its proposal, ITP indicated its intention to employ Wackenhut—the incumbent contractor for the OST support services contract—as a subcontractor. ITP further advised that it planned to retain a number of Wackenhut's key personnel for performance of the contract.

On December 17, 2008, after completing its evaluation of the proposals, the Project Team documented its findings in a final evaluation report and briefed the Source Selection Authority. On December 22, 2008, the Source Selection Authority selected ITP as the offeror that provided the best value to the government. The contract was awarded to ITP on December 29, 2008.

On December 31, 2008, Advanced Technologies and Laboratories International, Inc. ("ATL"), another disappointed bidder, filed a protest with the Small Business Administration challenging ITP's financial and managerial qualifications for the award and asserting that ITP's subcontractor, Wackenhut, was only an "ostensible" subcontractor in that Wackenhut, rather than ITP, would be the business entity principally responsible for the management and performance of the contract. The protest was denied on January 28, 2009.

On January 12, 2009, ATL also filed a protest with the Government Accountability Office asserting that DOE: (1) had not properly mitigated or disclosed organizational conflicts of interest involving ITP, Wackenhut, and DOE prior to the beginning of the procurement; (2) had incorrectly assessed ATL's and ITP's proposed costs; and (3) had improperly evaluated ITP's and ATL's technical proposals. In response to ATL's protest, DOE agreed to take corrective action to clarify and, where appropriate, resolve the alleged deficiencies in its proposal evaluations. DOE further agreed to document its findings

and issue a new source selection decision. Accordingly, on February 19, 2009, ATL withdrew its protest.

As part of its corrective action, the Project Team reconvened and reevaluated the proposals with respect to past performance and cost and reconsidered potential organizational conflicts of interest issues. In reevaluating past performance, the Project Team determined that no additional current and relevant past performance information was available for any of the offerors. Consequently, no changes were made to the past performance ratings.

In reevaluating cost, the Project Team reviewed the cost realism analysis for each of the offerors in accordance with the solicitation and the Source Evaluation Plan and developed a probable cost estimate for each of the offerors based on the information provided in Volume II (Technical and Management) and Volume III (Cost) of each proposal. Beginning with plaintiff's proposal, the Project Team determined that plaintiff's proposed labor categories and skill mix were consistent with its technical approach, but concluded that plaintiff's overall quantity of hours was low and failed to include all necessary labor categories. The Project Team accordingly added five new labor categories and **[redacted]** direct labor hours to plaintiff's proposal, thereby increasing plaintiff's direct labor hours from **[redacted]** to **[redacted]**. In addition, the Project Team determined that it was necessary to increase plaintiff's proposed labor rates in certain labor categories (in the areas of Property Specialist, Munitions Specialist, and Armorer) to meet the minimum wage rates set by the U.S. Department of Labor. The Project Team thus increased plaintiff's proposed cost of $4,937,720 by $1,004,607, establishing a total probable cost of $5,942,327.

The Project Team made similar adjustments to ITP's proposal. Recognizing that ITP intended to hire individuals from Wackenhut's staff, the Project Team increased ITP's proposed direct labor rates to reflect the current average labor rates by labor category. In addition, the Project Team increased ITP's proposed direct labor hours by **[redacted]** (from **[redacted]** to **[redacted]**) to account for a shortage of labor hours in certain labor categories (in the areas of Instructor, Opposition Force,

Instructional Systems Designer, Logistics and Property, Munitions, Armorers, and Controller). Finally, the Project Team increased ITP's proposed labor hours for the Wackenhut subcontract by **[redacted]** (from **[redacted]** to **[redacted]**). The Project Team thus increased ITP's proposed cost of $2,372,422 by $1,621,467, arriving at a total probable cost of $3,993,889.

As a final step in the agency's corrective action, the contracting officer performed a detailed analysis of the potential for organizational conflicts of interest in the procurement. Based on her analysis, the contracting officer determined that neither Wackenhut's performance of the OST support services contract nor ITP's performance of the POIO contract provided ITP with nonpubllic information that would give it a competitive advantage in the procurement.[3/] The contracting officer thus concluded that no organizational conflicts of interest existed that would preclude an award of the contract to ITP.

The Project Team documented its conclusions in a revised final evaluation report on May 19, 2009.[4/] Following a June 4, 2009,

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[3/] At the time of the solicitation, ITP was serving as the incumbent contractor for DOE's Program Office of Independent Oversight—an audits/assessments contract that required ITP to oversee and review the performance of other OST contractors.

[4/] The revised report contained the following overall evaluation results:

Evaluation Criteria	**ITP**		**PAI**	
	Adjectival Rating	Score/ Percentage	Adjectival Rating	Score/ Percentage
Technical Approach	Good	270/90%	Satisfactory	240/80%
Key Personnel	Excellent	282/94%	Excellent	279/93%
Corporate Experience	Excellent	300/100%	Good	261/87%
Past Performance	Excellent	100/100%	Excellent	100/100%
Total Score	Excellent	952/95%	Good	880/88%

(continued...)

briefing, the Source Selection Authority selected ITP as the successful offeror based on its best value to the government due to its highest technical rating and lowest probable cost. The top four offerors were ranked as follows:

1. Innovative Technology Partnerships, LLC
2. PAI Corporation
3. Technical Field Engineering, Inc.
4. Advanced Technologies and Laboratories International, Inc.

DOE notified ITP and the other offerors of the new source selection decision on June 17, 2009, and thereafter concluded written debriefings.

Plaintiff filed suit in this court on June 23, 2009. Plaintiff now seeks a court order directing DOE to: (i) disqualify ITP from the award of the support services contract; (ii) modify the pricing adjustments DOE made to plaintiff's proposal; and (iii) make a new source selection from among the remaining offerors.

DISCUSSION

This court's bid protest jurisdiction is set forth at 28 U.S.C. § 1491(b)(1) (2006), which authorizes the court "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The statute specifies that in addressing such an action, the court "may award any relief that [it] considers proper, including declaratory and injunctive relief," § 1491(b)(2), and further directs that "[i]n any action under this subsection, the court[] shall review the agency's decision pursuant to the standards set forth in [the Administrative Procedures Act]," § 1491(b)(4). Under this standard of

[4/](...continued)

review, a procuring agency's decision must be upheld unless it is shown to be without any reasonable basis in fact or is erroneous as a matter of law. Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

Plaintiff challenges the instant procurement on essentially three grounds. First, plaintiff contends that DOE improperly handled the potential conflict of interest inherent in ITP's partnership with Wackenhut and maintains that ITP should consequently be excluded from the competition. Second, plaintiff asserts that DOE impermissibly considered the corporate experience of subcontractors in evaluating the proposals despite what plaintiff sees as the solicitation's limitation of that criterion to offerors. Third, plaintiff argues that DOE improperly conducted its cost realism analysis by unreasonably increasing plaintiff's direct labor hours and by arbitrarily adjusting plaintiff's labor rates. We address these issues in turn below.

A.

Plaintiff's primary argument is that the competitive integrity of the procurement was compromised through ITP's access to nonpublic information which gave ITP an unfair advantage in the procurement. In particular, plaintiff contends that ITP's and Wackenhut's roles as incumbent contractors gave ITP inside information regarding how Wackenhut and other contractors planned and performed particular OST activities. In plaintiff's view, such cost and staffing data provided ITP with a clear advantage in responding to the sample task orders set forth in the solicitation. Plaintiff thus argues that the procurement was tainted by an organizational conflict of interest—specifically, unequal access to information favoring a particular offerer—that now requires the court to declare the award to ITP unlawful.

The contracting officer addressed this very issue in a memorandum titled "Organization Conflict of Interest Analysis" issued on June 8, 2009, in response to ATL's January 2009 protest before the Government Accountability Office. In her memorandum, the contracting officer noted that she had reviewed each offeror's

submissions regarding any potential organizational conflicts of interest (a certification was required as part of each proposal) and had determined that no significant potential conflict existed with respect to any offeror. Specifically, the contracting officer determined that although ITP and Wackenhut had access to nonpublic information through their existing contracts, such information had no competitive value in the instant procurement. With respect to ITP, the contracting officer found that the information to which it had access involved constantly changing requirements and thus was of little use as it was quickly outdated.[5/] With respect to Wackenhut, the contracting officer similarly determined that the information to which it had access was not germane to the requirements addressed in the solicitation's first two sample task orders and in the case of the third sample task order (relating to the contractor's proposed transportation utilization program) had been effectively offset by other information disclosed in the solicitation.[6/] The contracting officer further observed that both she and the technical representative regarded the information released by DOE

[5/] The contracting officer additionally noted that ITP had installed a "firewall" between its employees who were involved in OST operational readiness training and its senior management, so that senior management was prevented from acquiring any information regarding the conduct of the POIO contract or from exercising any influence over the ITP employees in their performance of that contract.

[6/] The contracting officer identified four nonpublic documents to which Wackenhut had access as the incumbent contractor for the OST support services contract: the OST Playbook (an assessment of OST federal agent performance), the OST Site Security Plan, the Contractor Transportation Utilization Program Standard Operating Procedures, and the OST Lesson Plans. The contracting officer concluded that neither the playbook nor the site security plan was competitively useful, however, because neither contained any information that would be relevant to the three sample task orders. The contracting officer additionally concluded that although the standard operating procedures for the Contractor Transportation Utilization Program were relevant to the third sample task order, that information had been effectively offset by the disclosure of OST's Policy Number 8.06B, which described the standards of conduct for contractors operating OST equipment on over-the-road transportation. Finally, the contracting officer observed that security concerns associated with the OST lesson plans precluded their release to <u>any</u> offeror, including to ITP by Wackenhut. The contracting officer noted that Wackenhut had indeed complied with the security restrictions in its contract with OST: "After further review of [Wackenhut's] award fee reports, I found no evidence to suggest that [Wackenhut] ever disclosed [the information contained in the OST Lesson Plans] to any entity outside of [the National Nuclear Security Administration]."

to be sufficient to guide offerors in preparing an effective technical proposal. Based on the foregoing, the contracting officer concluded that no organizational conflicts of interest existed that would preclude an award to ITP for the support services contract.

Plaintiff now urges the court to reject the contracting officer's conclusion on the grounds that: (1) the analysis should have been conducted prior to the issuance of the solicitation and was therefore untimely; (2) the remedial steps taken by the contracting officer to address any potential conflicts of interest were not approved by the chief of the contracting office and were thus unauthorized; and (3) the existence of a conflict is clear on the face of ITP's proposal. In support of the first point, plaintiff asserts that the contracting officer is required under the Federal Acquisition Regulations ("FAR") to analyze planned acquisitions in order to: "(1) [i]dentify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (2) [a]void, neutralize, or mitigate significant potential conflicts before contract award." 48 C.F.R. (FAR) § 9.504(a). Compliance with the FAR, plaintiff maintains, would have required the contracting officer to have undertaken her analysis more than a year earlier than she did, i.e., by April 2008—the date when DOE first became aware that ITP intended to partner with Wackenhut in competing for the successor OST support services contract. Plaintiff presumes that such an earlier intervention would have prompted heightened attention to the likelihood of an organizational conflict of interest.

Plaintiff's argument, however, ignores the fact that the contracting officer did indeed act in a timely and comprehensive manner to address any potential problems associated with ITP's and Wackenhut's participation in the instant procurement. As the contracting officer noted in her analysis, Global Engineering & Technology, Inc., a potential bidder, had filed an agency-level protest in July 2008 (a date that preceded the issuance of the solicitation), alleging unequal access to information and thus an unfair competitive advantage to any offeror that partnered with Wackenhut. In particular, Global Engineering maintained that the solicitation, as then proposed, did not provide

sufficient information regarding the staffing levels necessary to support the sixteen task areas the offerors' were directed to address in their technical proposals.[7/]

In response to this concern, the contracting officer took a number of corrective steps, the most significant of which was to modify the required scope of the offerors' technical proposals. The contracting officer explained this point in her analysis as follows:

> [I]n light of the [Global Engineering] protest, I fundamentally altered the solicitation requirements. Instead of requiring all offerors to propose on 15 of the 16 [Performance Work Statement] Task Areas over a five year period of performance, as initially envisioned . . . offerors now only had to address three Sample Task Orders covering a 12 month period of performance or less. For example, Task Order 1 entitled "Conduct Agent Candidate Training (ACT)," set forth the performance objectives of ACT and specifically identified the applicable Task Areas. In this case, offerors were instructed to address seven Task Areas (Task Areas 1 through 7) as part of their technical approach for Task Order 1. For Task Order 2, entitled "Conduct Operational Readiness Training (ORT)," offerors were provided the performance objectives for ORT and instructed to address eight Task Areas (Task Areas 1 through 7 and 9). For Task Order 3, not only did I provide offerors with very specific information for three fictitious transportation scenarios, I provided offerors information regarding the number of drivers and transportation assets

[7/] The Performance Work Statement identified the 16 task areas as follows: (1) paramilitary training programs support; (2) analysis, design, and development of training curricula and training plans; (3) logistical support of OST programs; (4) property management; (5) equipment operators; (6) munitions support; (7) armorer support; (8) mission related work; (9) shipping, receiving, tagging, storage, and issuance of equipment and supplies; (10) contractor transportation and utilization program; (11) quality assurance program; (12) safety program; (13) program and management analysis; (14) resources and business management support; (15) fleet vehicle management support; and (16) safeguards and security.

> needed to complete each scenario as well as trip duration and locations.

In addition to narrowing the scope of the offerors' technical proposals, the contracting officer also provided offerors with a historical twelve-month snapshot of the direct productive labor hours, by location, for each of the solicitation's task areas. Further, the contracting officer provided offerors with an estimated training calendar for OST for the twelve-month period from December 2008 to December 2009, and with the Lesson Plan Master Listing which contained a detailed list of the types of training that offerors would be expected to provide. Finally, the contracting officer revised the solicitation to require all offerors to certify as part of their proposals that their participation in the procurement did not give rise to any organizational conflicts of interest. In light of these actions, plaintiff's argument that the contracting officer did not act in a timely manner to address concerns regarding unequal access to competitively useful information is simply not correct.

Nor can we accept plaintiff's contention that the award to ITP is unlawful because the contracting officer failed to obtain the requisite authorization for the adjustments she made to the solicitation in light of Global Engineering's protest. In plaintiff's view, the FAR requires that any such adjustments be approved by a senior-level procurement official. The regulation to which plaintiff refers reads as follows:

> (b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer shall, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—
>
> (1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict . . . .

FAR § 9.506.

Plaintiff's argument, which would apply the approval authority requirement of FAR § 9.506(b) to the adjustments the contracting officer made to the draft solicitation in June 2008, overreads the regulation. The focus of this regulation, as we read it, is on a solicitation that, as issued, would present significant potential organizational conflicts of interest unless remedial steps are undertaken to avoid, neutralize, or mitigate those conflicts. As the subsequent FAR provision makes clear, "potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts." FAR § 9.507-1. In other words, it is the "corrective" restraints introduced into a solicitation to address potential organizational conflicts of interest that are the concern of FAR § 9.506(b), not substantive adjustments to the content of the solicitation before its final release.

This is not the situation we face here. As the contracting officer explained in her analysis, she "took a number of steps to address potential [organizational conflicts of interest] during the pre-solicitation phase" and added that it is "worthwhile to note that the draft OST solicitation in June 2008 was significantly different than the final solicitation." As to the final solicitation, the contracting officer "determined that no [organizational conflict of interest] exists . . . which would preclude an award to ITP." FAR § 9.506(b) simply does not apply to the contracting officer's actions.

Turning then to the third and final argument in support its claim of unequal access to information, plaintiff challenges the contracting officer's determination that no organizational conflicts of interest existed that would preclude an award to ITP. According to plaintiff, it is clear from the opening paragraph of ITP's response to the first and second sample task orders that ITP had a significant advantage through its own and Wackenhut's status as incumbent OST contractors.[8] This

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[8] The opening paragraph of ITP's response to Task Order 1, which is essentially identical to the opening paragraph of its response to Task Order 2, reads as follows:

Upon successful completion of transition, ITP will subcontract with [Wackenhut]
(continued...)

paragraph, however, does nothing more than declare that ITP intends to assign responsibility for the performance of the task orders to its subcontractor, Wackenhut, and that Wackenhut, in turn, will engage the services of individuals whose prior experience includes "all of the functions associated with this [task order's] requirements." The paragraph, in other words, contains nothing to support a claim of unequal access to information.

The fact that Wackenhut has performed activities identified in the solicitation's sample task orders and therefore can be expected to have a more informed understanding of those activities than a first-time contractor undoubtedly offers ITP some competitive advantage. But such an advantage is the product of experience rather than the result of having access to nonpublic information garnered from the government through a special relationship. Under prevailing case law, only information of the latter sort is regarded as yielding an unfair competitive advantage that might taint a procurement; information that draws upon a contractor's own experience is not so regarded. This point is well explained in ARINC Engineering Services, LLC v. United States, 77 Fed. Cl. 196, 203–204 (2007), as follows:

> [F]or an organizational conflict of interest to exist based upon unequal information, there must be something more than mere incumbency, that is, indication that: (i) the awardee was so embedded in the agency as to provide it with insight into the agency's operations beyond that which would be expected of a typical government

[8](...continued)
who will employ Mr. Scott Taylor, the current Assistant General Manager for Training, as the Training Program Manager. Mr. Taylor has performed all functions associated with this activity for the past two years and will be the Task Manager for this [task order]. Also, upon contract award and successful completion of transition, ITP will hire the current Assistant General Manager for Logistics, Mr. James (Eddie) Gordon, as the Logistics Program Manager. Mr. Gordon has performed all of the functions associated with this [task order's] requirements for the incumbent, [Wackenhut], since January of 2008 . . . . Mr. Gordon will support the [task order] Manager, Mr. Taylor for this effort.

> contractor; (ii) the awardee had obtained materials related to the specifications or statement of work for the instant procurement; or (iii) some other "preferred treatment or . . . agency action" has occurred.

(Footnotes omitted.) Plainly, the instant case does not involve nonpublic information within the meaning of the organizational conflict of interest rules.

B.

Plaintiff's second objection to the procurement is that DOE erred by considering the corporate experience of subcontractors in evaluating the proposals, thereby awarding ITP an "Excellent" rating for that criterion due in part to Wackenhut's successful prior performance history. Plaintiff contends that under the terms of the solicitation, information detailing corporate experience was to be submitted by each "offeror"—a term which, according to plaintiff, is defined in the solicitation as "the single legal entity submitting the offer." Thus, in plaintiff's view, DOE should have considered only ITP's corporate experience and not also the corporate experience of Wackenhut.

Plaintiff's argument is without merit. Section L of the solicitation, titled "Instructions, Conditions, and Notices to Offerors," defines the term "offeror" as follows:

> The term "Offeror" as used in this Section L refers to the single legal entity submitting the offer as a "Contractor team arrangement" as that term is defined in FAR 9.601. The Offeror may be preexisting or newly formed for the purposes of competing for this Contract.

In the following paragraph, the solicitation employs this definition of the term "offeror" in the context of the solicitation's corporate experience and past performance criteria:

> The Offeror shall submit information on Corporate Experience and past performance . . . of all those companies comprising its "Contractor team arrangement" that will perform major or critical aspects of the Performance Work Statement (PWS) Task Areas . . . .

The term "contractor team arrangement" is in turn defined in FAR § 9.601 as an arrangement in which:

> (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
> (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

Based on these provisions, the court can discern no basis for concluding that DOE erred in considering ITP's experience to include the relevant past experience of its subcontractor Wackenhut. Plaintiff has offered no plausible argument to the contrary.

C.

In its third and final ground for challenging the contract award, plaintiff asserts that DOE's cost realism analysis was arbitrary and capricious because the contracting officer: (1) arbitrarily increased plaintiff's cost proposal by **[redacted]** direct labor hours, essentially adding eleven full-time equivalent personnel despite the technical representative's finding that plaintiff had omitted only five direct labor categories and despite the fact that plaintiff's direct labor hours as originally proposed were virtually identical to ITP's (**[redacted]** vs.**[redacted]**); and (2) failed to adjust plaintiff's proposed cost downward in certain labor categories to reflect minimum wage rates set by the U.S. Department of Labor, despite having adjusted the proposed cost upward in other labor categories in accordance with those same

minimum wage rates.[9] Plaintiff requests that the court direct that DOE, in reevaluating the proposals, consider plaintiff's proposal as it was initially submitted (i.e., with **[redacted]** direct labor hours rather than the adjusted **[redacted]**) and account for the minimum wage rates set by the U.S. Department of Labor with the appropriate downward cost adjustment. Plaintiff identifies that amount as $214,000.[10]

In assessing the reasonableness of DOE's cost realism analysis, we begin with the principle that "[d]ecisions on cost realism are within the agency's sound discretion and expertise" and will not be overturned

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[9] In its initial brief, plaintiff offered a third basis for its assertion that DOE's cost realism analysis was arbitrary and capricious. Specifically, plaintiff noted that the technical representative had found that plaintiff's responses to the first and second sample task orders failed to account for manning the OST Exercise Control Center when conducting training exercises. Plaintiff argued, however, that the technical representative's assessment was predicated on a "clarification" that did not appear in the Administrative Record and that required nonpublic knowledge of Wackenhut's support staffing—i.e., that plaintiff had failed to propose sufficient staffing for the Exercise Control Center because it was not provided with the requisite information in the procurement to do so.

As defendant observed in its cross-motion, however, all offerors, including plaintiff, were directly notified of the Exercise Control Center's manning requirements in Section 6.1.2.6 of the Performance Work Statement, which stated that "[t]he contractor shall provide support for the operation of the Exercise Control Center (ECC) fixed site at [Transportation Safeguards Training Site] and mobile sites, as required." In addition, defendant pointed out that DOE clarified this requirement during the solicitation's question-and-answer session as follows:

> Question: Operational support for Exercise Control Center (ECC) fixed and mobile site. Can the government provide the staffing criteria for the ECCs?
>
> Response: Typically two people man the ECC whenever on site or off site training is being conducted.

We thus conclude that plaintiff's argument on this point is without merit.

[10] In calculating that amount, plaintiff explains that it proposed a total of 32,000 direct labor hours in three labor categories for which it had overstated labor rates (i.e., an overstatement of $6.21 per hour for the position of Administrative Assistant, an overstatement of $3.67 per hour for the position of Tactic Trainer, and an overstatement of $3.67 per hour for the position of Controller & Range Safety Officer) and marked-up these direct labor hours with a multiplier of **[redacted]**.

if they "reflect that the agency took into account the information available and did not make irrational assumptions or critical miscalculations." Halter Marine, Inc. v. United States, 56 Fed. Cl. 144, 172 (2003). Applying this standard, we are unable to conclude that DOE's cost realism analysis was either arbitrary or capricious. In making probable cost adjustments, DOE employed the following process:

1. When a unique technical approach was presented, the Project Team utilized the technical representative's expert judgment to adjust an offeror's proposed staffing or other direct costs to reflect any additions or reductions to realistic levels necessary to accomplish the unique technical approach.

2. In the absence of a unique technical approach or other evidence explaining the sufficiency of the proposed direct productive labor hours, the Project Team adjusted an offeror's staffing or other direct costs based on the technical representative's expert judgment and/or the government's baseline.

3. In the event that an offeror did not address a certain requirement or labor category in its cost proposal, the Project Team adjusted the offeror's direct productive labor hours or other direct costs based on the offeror's overall approach to fulfilling the task order requirements (e.g., Can a comparable labor category with sufficient direct productive labor hours be used to fulfill the requirement?), the technical representative's expert judgment, and/or the government's baseline.

The record indicates that the Project Team's addition of **[redacted]** direct labor hours to plaintiff's cost proposal was the result of the Project Team's careful analysis using the process described above. In particular, the Project Team determined that plaintiff failed to propose any direct labor hours for the following necessary labor categories:

Opposition Force, Exercise Control Center Operator, Instructional Systems Designer,
Planning Specialist, and Logistics Carpenter. Plaintiff has failed to identify any fault with that analysis[11] and we can find none.

Plaintiff's second challenge to DOE's cost realism analysis is equally unavailing. DOE increased plaintiff's proposed costs in the labor categories for which plaintiff offered less than minimum wage rates based upon the clear requirements provided in the solicitation. The solicitation expressly informed offerors, for example, that they were required to comply with the wage requirements of the U.S. Department of Labor. Additionally, the solicitation incorporated FAR § 52.222-41, a provision which implemented the Service Contract Act of 1965, 41 U.S.C. §§ 351 et seq. (2006) by requiring that each service employee employed in the performance of the contract "be paid not less than the minimum monetary wages and . . . be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor." The solicitation did not, however, prohibit an offeror from proposing labor wage rates above the minimum wage. DOE accordingly had no basis to reduce costs offered by plaintiff in excess of the minimum wage rates.

Nor would the downward adjustment to its cost proposal that plaintiff seeks ultimately affect the resolution of this case. Even assuming that DOE had committed some error with respect to its cost realism analysis, plaintiff's protest would nevertheless fail because plaintiff cannot demonstrate a necessary element for obtaining injunctive relief: a showing that "there was a substantial chance it would

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[11] Plaintiff's observation that it proposed virtually the same number of direct labor hours as ITP does not, as plaintiff maintains, confirm the reasonableness of plaintiff's staffing. As an initial matter, the technical representative evaluated the reasonableness of an offeror's proposed staffing based not on a comparison with the proposals of other offerors, but on a comparison with the agency's internally formulated baseline and on an assessment of how well the offeror's proposed staffing fit with the offeror's own technical approach. In addition, plaintiff is mistaken in its assertion that ITP's proposed labor hours were not subject to adjustment; the agency added **[redacted]** direct labor hours to ITP's proposal. The fact that plaintiff and ITP initially proposed a similar number of direct labor hours is thus irrelevant to the analysis.

have received the contract but for that error." Four Points by Sheraton v. United States, 66 Fed. Cl. 776, 783 (2005). The solicitation provided that an offeror's technical approach to the sample task orders, key personnel, corporate experience, and past performance were significantly more important than cost. In its decision, the Source Selection Authority explained the selection of ITP as follows:

> While I believe that ITP's superior technical proposal would be worth the premium of a much higher cost, the fact that ITP offers the lowest probable cost makes its selection an easy choice. Even if I were to compare ITP's probable costs against all other Offerors' proposed costs, without any probable cost adjustments, ITP would still be the highest technically rated Offeror and, with the exception of [Technical Field Engineering, Inc.], have the lowest cost. For these reasons, I find that ITP's proposal offers the best value to the Government, and I select ITP for award.

In addition, the downward adjustment plaintiff seeks would result in a decrease, by plaintiff's own calculation, of $214,000. But plaintiff's proposed cost of $4,937,720, even without adjustments, is almost $1 million more than ITP's total probable cost, with DOE adjustments, of $3,993,889. Plaintiff, in other words, would not have been awarded the contract regardless of whether its proposed costs remained unaltered.

CONCLUSION

For the reasons set forth above, plaintiff's motion for injunctive relief is denied and defendant's and defendant-intervenor's cross-motions for judgment on the administrative record are granted. Accordingly, the clerk is directed to enter judgment dismissing plaintiff's complaint.

s/John P. Wiese
John P. Wiese
Judge

PROOF OF SERVICE

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Thursday, December 10th, 2009 he caused to be sent, by Overnight Delivery, expenses prepaid, two copies of the foregoing Nonconfidential Principal Brief of Plaintiff-Appellant PAI Corporation to counsel for the United States at the following address:

Christopher L. Krafchek, Esq.
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Washington, D.C. 20530-0001

/s/ Cyrus E. Phillips IV

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Cyrus E. Phillips IV

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7), the undersigned hereby certifies, under the penalty of perjury, that this Nonconfidential Principal Brief is set in Adobe's Minion® Pro Opticals, a proportionally-spaced Garalde Oldstyle face; that this Nonconfidential Principal Brief is set in face 14-point or larger; and that this Nonconfidential Principal Brief contains no more than 14,000 words, *viz.*, that exclusive of the Certificate of Interest, the Table of Contents, the Table of Authorities, the Statement of Related Cases, and the Addendum, FED. R. APP. P. 32(a)(7)(B)(iii) and FED. CIR. R. 32(b), it contains 9,772 words out of 922 lines and 56,984 characters. I make this representation based on the "Word Count" Dialog Box as presented on the Status Bar at the bottom of the workspace in Microsoft® Office Word 2007 (12.0.6514.5000) SP2 MSO (12.0.6425.1000).

/s/ Cyrus E. Phillips IV

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Cyrus E. Phillips IV