
IN THE UNITED STATES COURT APPEALS FOR THE FEDERAL CIRCUIT

No. 2010-5003

PAI CORPORATION (doing business as Professional Analysis),

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee,

and

INNOVATIVE TECHNOLOGY PARTNERSHIPS, LLC,

Defendant-Appellee.

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

BRIEF FOR DEFENDANT-APPELLEE, THE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Rules of the Court of Appeals for the Federal Circuit, counsel for appellee states that we are unaware of any other related cases.

2010-5003

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APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN
09-CV-411, SENIOR JUDGE JOHN P. WIESE

JURISDICTIONAL STATEMENT

Without conceding the appellant's position or various factual assertions stated in its "Jurisdictional Statement," the Government agrees that the Court of Federal Claims issued a final judgment pursuant to Rule 58 of the Rules of the Court of Federal Claims on September 24, 2009, and that this Court has jurisdiction to consider the appeal pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUE

Whether the United States Court of Federal Claims properly determined that 48 C.F.R. § 9.506(b)-(c) does not apply to the contracting officer's actions in July 2008.

STATEMENT OF THE CASE

PAI Corporation's ("PAI") "Statement of the Case" and "Statement of the Facts," Appellant's Brief at 6 - 29 ("PAI's Brief"), contain assertions, arguments, and legal conclusions with which we disagree, or which are not relevant to the issue in this appeal. We also believe that additional information may help the Court. For these reasons, we provide below a statement of the nature of the case, a statement of the facts, and a description of the prior proceedings.

I. Nature Of The Case

PAI seeks to overturn a decision of the United States Court of Federal Claims in PAI Corporation v. United States, 2009 WL 3049213 (Fed. Cl. 2009). In that case, PAI filed a bid protest challenging award of a contract to Innovative Technology Partnerships, LLC ("ITP") by the U.S. Department of Energy's ("DOE's") National Nuclear Security Administration's ("NNSA's") Office of Secure Transportation ("OST"). Before the trial court, PAI argued that the DOE's decision to award the OST Support Services Contract to ITP was arbitrary and

capricious because the DOE failed to mitigate an organization conflict of interest. In support of this argument PAI alleged that ITP held an unfair competitive advantage over other offerors because of allegedly having access to non-public information through its subcontractor, Wackenhut Services, Inc. (“Wackenhut”), and through its own performance as the incumbent for OST’s Program Office of Independent Oversight (“POIO Contract”). PAI Corporation, 2009 WL 3049213, 3. PAI also argued that PAI failed to adhere to the solicitation’s evaluation scheme for corporate experience and cost. Id.

The trial court rejected each of PAI’s arguments, denied its cross-motion for judgement upon the administrative record pursuant to Rule 52.1 of the Rules of the Court of Federal Claims, and dismissed its complaint. PAI Corporation, 2009 WL 3049213, 17. On appeal, PAI challenges the trial court’s determination that 48 C.F.R. § 9.506(b) did not apply to the contracting officer’s pre-solicitation procurement activities. PAI’s Brief at 34. PAI argues that the contracting officer’s modifications of the draft solicitation in July 2008 were improper because they allegedly were not reviewed and approved by the head of the contracting activity as required by 48 C.F.R. § 9.506(b)-(c). Id. at 34-35.

As we demonstrate below, PAI’s contentions are without support either in law or fact.

II. Statement Of Facts

On December 13, 2007, the DOE issued a sources sought synopsis notice through the DOE Industry Interactive Procurement System and the Federal Business Opportunities website seeking qualified small businesses capable of fulfilling the OST requirements. A680. DOE received 20 responses and, after reviewing the offerors' statements of capability, determined on February 4, 2007 that two or more small-businesses were capable of satisfying the performance work statement. Id. Accordingly, the DOE designated the procurement as a total small business set-aside. Id. The acquisition plan for the OST requirement was approved by NNSA's Head of Contracting Authority ("HCA") on April 8, 2008. A801.

The acquisition plan provided guidance in the procurement of support services for a range of paramilitary training for its federal agents that include curriculum development, logistical management, property management, administrative management, transportation of critical equipment, and other related technical and administrative support services. A801-811.

On May 7, 2008, an Industry Day conference was held at Ft. Chaffee, AR in which 57 individuals representing 41 firms were in attendance. A680.

On July 11, 2008, prior to release of the final solicitation, DOE received an

agency-level protest from Global Engineering & Technology (“GET”) alleging an organization conflict of interest (“OCI”) based upon unequal access to information. A692. GET alleged that any company partnering with the incumbent, Wackenhut, would have an unfair competitive advantage because they would have unequal access to information. Id. Specifically, GET argued that DOE failed to provide sufficient information regarding the staffing levels necessary to support 16 task areas outlined in the performance work statement. Id.

After careful consideration of GET’s agency-level protest, the HCA determined that GET was not an interested party to protest the draft solicitation because it had not been approved for final release. A692. However, in the interest of promoting competition, DOE elected to provide offerors with a 12-month snapshot of the direct labor hours for each of the task areas by location and released an estimated training calendar for OST from December 2008 to December 2009. Id.

On July 30, 2008, the DOE launched the OST Support Services Contract website, providing links to a “reading room,” and “questions and answers” for the procurement. A820. In the “reading room,” the DOE publicly released the OST support services contract that was, at that time, being performed by Wackenhut pursuant to contract number DE-AM04-03AL67577, including the performance

work statement. A 802. The reading room also provided documents and information from the DOE's Industry Day, including the attendance roster, the briefings packages explaining the OST command structure, mission, and logistics and property management, insight into federal agent readiness training in the areas of Agent Candidate Training and Operation Readiness Training, and the questions and answers from Industry Day. A804-894.

On August 29, 2008, the DOE issued a small-business set-aside competitive solicitation to provide training support services for the OST. A44-239. The solicitation involved a single indefinite-delivery, indefinite-quantity cost-plus-award-fee type contract for a base period of two years and two 18-month option periods. A45. The guaranteed minimum under the contract was \$3,000,000 and the maximum ordering limit was \$95,000,000. A46. Prior to the request for proposals closing date, the DOE issued three amendments. A240-274.

After receipt of nine timely proposals, the contracting officer conducted an initial review to determine if the offerors submitted all information required by the solicitation. A626. As part of the initial review, the contracting officer ensured that the OCI disclosures revealed no actual or potential OCIs and confirmed compliance with the solicitation's limitations on subcontracting. A630.

On December 22, 2008, the source selection authority selected ITP as the

offeror that provided the best value to the Government. A679. On December 29, 2008, after determining that ITP was a responsible contractor in accordance with 48 C.F.R. § 9.104-1, the contracting officer awarded the contract to ITP. Id.

On January 12, 2009, Advanced Technologies And Laboratories International, Inc. (“ATL”) filed a protest with the Government Accountability Office (“GAO”) alleging: (1) OCIs involving ITP, Wackenhut, and the DOE that were not properly mitigated or disclosed prior to the beginning of the procurement, (2) improper evaluation of ATL's and ITP's proposed costs, and (3) improper evaluation of ITP's and ATL's technical proposals. A596-611.

In response to ATL's protest, DOE agreed to take corrective action to clarify, and resolve where appropriate, the raised OCI issues, the cost realism evaluation, and the past performance evaluation. A616. DOE further agreed to document its findings and issue a new source selection decision. Id. ATL withdrew its protest on February 19, 2009.

As part of its corrective action, the Integrated Project Team reconvened and reevaluated proposals for past performance and cost and reconsidered potential OCIs. A620-633. The HCA reviewed and approved the revised corrective action final evaluation report for the OST support services contract on May 18, 2009. A620.

In her OCI analysis, the contracting officer completed a comprehensive and detailed OCI investigation and concluded that no OCI existed for ITP or Wackenhut that would preclude an award to ITP for the OST Support Services Contract. A691-703. The contracting officer also documented and explained in significant detail each of the previous steps she took throughout the procurement in dealing with potential OCIs. Id.

On June 4, 2009, the integrated project team briefed the source selection authority who then selected ITP as the successful offeror that represented the best value to the Government due to its highest technical rating and lowest probable cost. A677-690. Prior to the source selection decision, the revised source selection statement had been sent to the HCA for review and approval on June 3, 2009. A677.

After learning of the award to ITP, PAI filed a complaint in the Court of Federal Claims alleging that the integrity of the procurement was compromised through an alleged unequal access to information OCI. A8. PAI also challenged DOE's technical and price evaluation, however, those issues are not raised on appeal. Id.

III. Course Of Proceedings And Disposition Below

The parties filed cross-motions for judgment upon the administrative record.

The Government argued that DOE, after careful and thorough review of potential OCI issues, properly determined that an unequal access to information OCI did not exist during the pre-solicitation phase and, therefore, there was no requirement for documenting the contracting officer's determination. The Government also argued that DOE properly determined that ITP did not have unequal access to non-public information that was competitively useful. The Government further argued that any advantage that was afforded to ITP was based upon mere incumbency, which alone, could not support PAI's OCI claim before the trial court.

On September 24, 2009, the Court of Federal Claims denied PAI's cross motion for judgement upon the administrative record, granted the Government's motion for judgement upon the administrative record, and dismissed PAI's complaint. PAI Corporation, 2009 WL 3049213, 17. Concerning the sole issue raised on appeal by PAI, the trial court held, based upon the facts presented in this particular case, that 48 C.F.R. § 9.506(b) did not apply to the contracting officer's actions because she timely responded to an agency-level protest to the draft solicitation in July 2008 and was not required to seek approval from a senior-level procurement officer prior to modifying the draft solicitation. PAI Corporation, 2009 WL 3049213, 11-12. The trial court also held that 48 C.F.R. § 9.506(b) does not apply to the adjustments the contracting officer made to the draft solicitation in

July 2008 because, when read in conjunction with § 9.507, the subsequent provision, “it is the “corrective” restraints introduced into a solicitation to address potential organizational conflicts of interest that are the concern of 48 C.F.R. § 9.506(b), not substantive adjustments to the content of the solicitation before its final release.” Id.

The judgment became final on September 24, 2009, and PAI filed a timely appeal.

SUMMARY OF THE ARGUMENT

PAI misunderstands the import of 48 C.F.R. § 9.506(b) and would have this Court apply the provision out of context and without an adequate basis in law. The trial court, however properly held that 48 C.F.R. § 9.506(b) must be read in conjunction with 48 C.F.R. § 9.507. When read together, the two provisions are related to the imposition of future restrictions upon an offeror or offerors when a potential significant OCI cannot be otherwise avoided, neutralized, or mitigated. Moreover, 48 C.F.R. § 9.504 is the provision applicable to the contracting officer’s action in July 2008, and the record demonstrates that she acted reasonably and in accordance with this provision when carrying out her responsibilities. Furthermore, the DOE lawfully evaluated ITP’s and PAI’s proposals in accordance with the solicitation and Source Evaluation Plan.

ARGUMENT

I. Standard Of Review

In an appeal from a judgment upon the administrative record, this Court reviews the trial court's determination of legal issues without deference. Centech Group, Inc. v. United States, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (citing Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005)); see also Alabama Aircraft Indus., Inc.-Birmingham v. United States, 586 F.3d 1372, 1374 (Fed. Cir. 2009); Weeks Marine, Inc. v. United States, 575 F.3d 1358, 1363 (Fed. Cir. 2009); CHE Consulting, Inc. v. United States, 552 F.3d 1351, 1354 (Fed. Cir. 2008). The Federal Circuit thus applies the “‘arbitrary and capricious’ standard of 5 U.S.C. § 706 anew, conducting the same analysis as the Court of Federal Claims.” Centech, 404 F.3d at 1351 (citing 28 U.S.C. § 1491(b)(4)).

In a bid protest case, an agency's action must be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Bannum, 404 F.3d at 1351; see also 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(A). The court's task is to determine whether “(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.” Weeks Marine, 575 F.3d at 1358.

Contracting officers “are entitled to exercise discretion upon a broad range

of issues confronting them in the procurement process.” Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

For that reason, procurement decisions “invoke[] ‘highly deferential’ rational basis review.” CHE Consulting, 552 F.3d at 1354. Under that standard, the Court must sustain an agency action unless the action does not “evince[] rational reasoning and consideration of relevant factors.” Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1058 (Fed. Cir. 2000).

Identification of OCIs and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion. See Axiom Res. Mgmt v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009) (citing 48 C.F.R. § 9.505). “The responsibility for determining whether such unequal access exists and what steps should be taken in response thereto rests squarely with the contracting officer.” Arinc Eng’g Servs., LLC v. United States, 77 Fed. Cl. 196, 201 (2007). To prevail under the deferential review employed in examining agency contracting decisions, a protestor must identify ‘hard facts,’ . . . ‘mere inference or suspicion of an actual or apparent conflict is not enough.’” CACI, Inc. –Fed. v. United States, 719 F.2d 1567, 1581 (Fed. Cir. 1983).

II. 48 C.F.R. § 9.506(b) Did Not Apply To The Contracting Officer's July 2008 Adjustment To The Draft Solicitation

As we demonstrate below, PAI misinterprets 48 C.F.R. § 9.506(b) and ignores the trial court's factual findings that are supported by substantial evidence in the administration record.

A. PAI Misinterprets 48 C.F.R. § 9.506(b)(1)

As the trial court correctly held, 48 C.F.R. § 9.506(b) necessarily contemplates a wholly different set of circumstances from those before the Court in this case. 48 C.F.R § 9.506(b) states:

If a 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, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft solicitation provision (see 9.507-1); and

(3) If appropriate, a proposed contract clause (see 9.507- 2).

Id. 48 C.F.R. § 9.507-1 states:

As indicated in the general rules in 9.505, significant 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.

Therefore, affected solicitations shall contain a provision that—

- (a) Invites offerors' attention to this subpart;
- (b) States the nature of the potential conflict as seen by the contracting officer;
- (c) States the nature of the proposed restraint upon future contractor activities; and
- (d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

Id. Accordingly, when a contracting officer determines that an acquisition contains an OCI that cannot be mitigated and, therefore, the contractor's participating in the procurement will result in future restrictions, the contracting officer's actions must be reviewed and approved by a senior-level procurement official. Inherent in the plain language of the two foregoing provisions is the pre-requisite factual determination by the contracting officer that a significant potential OCI is present and that future restrictions are necessary. All of this occurs prior to the issuance of the solicitation.

In this case, the contracting officer's release of information and adjustments

to the draft solicitation were neither based upon a determination that an OCI existed nor upon an identified need to impose a restraint upon a particular contractor's eligibility for future contracts or subcontracts. Rather, the contracting officer's actions were based upon her desire to respond to questions from industry, enhance competition, level the playing field, and resolve any potential OCIs raised by bidders. A692-693.

48 C.F.R. § 9.506(b) cannot reasonably be interpreted to apply to a contracting officer's actions during the pre-solicitation phase, when, as in this case, she had never determined there was an OCI, and when she had no announced intention to impose "restrictions" upon any of the prospective offerors in the procurement. Accordingly, PAI's contentions to the contrary are without merit.

Furthermore, PAI's reliance upon Filtration Development, LLC v. United States, 60 Fed. Cl. 371 (2004) is misplaced and easily distinguishable from the instant case. In Filtration, the court held that the contracting officer's determination that there was not a significant OCI in the acquisition was contradicted by the record, other Government personnel, and the designated awardee's submission of unsigned OCI mitigation plans. Id. at 378. In this case, there is nothing in the record that contradicts the July 2008 finding that an OCI did not exist prior to the issuance of the solicitation or, indeed, at any time thereafter.

B. PAI Ignores The Trial Court's Factual Findings, Which Are Substantially Supported In The Record

As demonstrated above, for 48 C.F.R. § 9.506 to apply, two factual prerequisites must be satisfied: (1) the contracting officer must find that a significant potential OCI exists prior to the issuance of the solicitation; and (2) the contracting officer must propose future restraints upon the contractor involved in the OCI. Based upon PAI's assertion that 48 C.F.R. § 9.506(b)-(c) applies to the contracting officer's July 2008 activities, PAI's argument may be read as a challenge to the trial court's finding of fact that the contracting officer's actions were related to a draft solicitation and that the contracting officer concluded that no OCIs existed that would preclude an award of the contract to ITP. PAI Corporation, 2009 WL 3049213, 3, 7.

To the extent that PAI is attempting to challenge the trial court's factual findings, "[t]his court . . . reviews judgments to determine whether they are 'incorrect as a matter of law' or premised on 'clearly erroneous' factual determinations." Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1171 (Fed Cir. 1991) (quoting Heisig v. United States, 719 F.2d 1153, 1158 (Fed. Cir. 1983)). PAI cannot establish that the trial court's factual findings were clearly erroneous because the administrative record contains substantial evidence

supporting the findings. A692-703.

Even if PAI is not challenging the trial court's factual findings, its argument ignores the fact that the two factual prerequisites were not present in July 2008 when the contracting officer released information and adjusted the draft solicitation. Accordingly, because the contracting officer never determined that a significant potential OCI existed, the trial court properly held that 48 C.F.R. § 9.506(b) did not apply to her actions in July 2008 and that she was not obligated to have her actions reviewed and approved by the HCA.

C. The Contracting Officer Was Not Required To Document Her Findings In July 2008

PAI attempts to make much out of the fact that the contracting officer did not document her finding in July 2008. This fact, however, provides no support to PAI's contentions. 48 C.F.R. § 9.504(d) requires the contracting officer to formally document her findings only "when a substantive issue concerning potential organizational conflict of interest exists." *Id.* As noted above, the record demonstrates that in July 2008, the contracting officer determined that there was neither an actual nor a potential significant OCI in the draft solicitation. A692. In fact, in July 2008, the HCA specifically determined that GET did not have standing to challenge the draft solicitation. *Id.* Accordingly, because the

contracting officer found there was no significant potential OCI, she was not required to document her findings and PAI's assertions are without merit.

III. The Contracting Officer Conducted A Reasonable OCI Analysis

PAI appears to argue that the solicitation contained two “unremedied informational deficiencies” that the contracting officer failed mitigate. PAI’s Brief at 34. PAI’s contentions are wholly without merit. The contracting officer’s OCI analysis was entirely consistent with 48 C.F.R. § 9.504, which required her to “identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible and avoid, neutralize, or mitigate significant potential conflicts before contract award.” Id. For assistance in making this determination, the contracting officer “should obtain the advice of counsel and the assistance of appropriate technical specialists” Id. § 9.504(b). The contracting officer is not required to take additional steps if there is a determination that no significant conflict exists. Id. § 9.504(d) (“The [contracting officer's] judgment need be formally documented only when a substantive issue concerning potential [OCIs] exists.”). If the contracting officer determines that a significant potential OCI may be present, however, certain steps must be taken before a solicitation is issued. Id. § 9.506(b). Amongst these steps, the contracting officer must proffer a “recommended course of action for avoiding, neutralizing, or mitigating the

conflict” to the head of the contracting activity or the chief of the contracting office. 48 C.F.R. § 9.504(c). A contracting officer’s determination regarding whether the acquisition involves a significant conflict will be overturned only on a showing of unreasonableness. Informatics Corp. v. United States, 40 Fed. Cl. 508, 513 (1998).

During the course of the procurement, the contracting officer made every effort to review and evaluate potential or actual OCIs and specifically found that the participation of ITP and its subcontractor, Wackenhut, did not create an impermissible OCI. A692-703.

The contracting officer carefully reviewed potential OCI issues three times, first during the pre-solicitation phase, second, during the solicitation phase, and third, after the DOE sought corrective action in response to a GAO protest brought by another offeror after the initial contract award. See id.

As noted above, the contracting officer carefully considered GET’s pre-solicitation protest alleging an unfair competitive advantage based upon Wackenhut’s status as the incumbent and, in the interest of promoting competition, she provided offerors with a historical 12-month snapshot from the year 2008 of the direct productive labor hours, by location, for each of the 16 Task Areas. A693. The contracting officer also provided offerors with an estimated

training calendar for OST from December 2008 to December 2009. See id.

In addition to releasing this information, the contracting officer took action to promote competition by fundamentally altering the solicitation requirements.

A692. Instead of requiring all offerors to submit proposals upon 15 of the 16 Task Areas over a five year period of performance, the offerors only had to address three sample Task Orders covering a 12 month period of performance or less.

These three sample Task Orders were: (1) Conduct Agent Candidate Training, (2) Conduct Operational Readiness Training, and (3) Contractor Transportation and Utilization Program. Id.

Additionally, during the solicitation phase, in September 2008, the contracting officer alerted potential offerors through Amendment 001 that certain documents and topic areas were considered nonpublic and would not be released to offerors. A692. These documents encompassed (1) the OST Playbook, (2) the OST Site Security Plan, and (3) the Contractor Transportation Utilization Program Standard Operating Procedures. She released this information in order to be as transparent as possible. A693.

After the offerors submitted their proposals in October 2008, which included certifications stating that no OCIs existed by their participation in the procurement, the contracting officer carefully reviewed each of the offeror's OCI

representations and submissions. A693. She determined that no significant potential OCIs existed with respect to any of the offerors. Id.

Prior to contract award and as part of her responsibility determination in accordance with 48 C.F.R. §§ 9.104-1 and 9.504(d), the contracting officer determined that no substantive issue existed concerning potential OCIs that would preclude contract award to ITP.

Finally, the contracting officer confirmed her determination when she again revisited the OCI issue after ATL filed a GAO protest following the DOE's initial award to ITP. A694. In its protest, ATL, among other claims, alleged an OCI based upon an unequal access and impaired objectivity OCI. Id. The contracting officer decided to take corrective action during which she formally documented her initial OCI analysis. In conducting her review, she considered the interests and activities of ITP and its subcontractors and, among researching other OCI issues, specifically considered "whether ITP, [Wackenhut]. . . had any past, present, or currently planned financial, contractual, organizational, or other interests with DOE/NNSA/OST." A694. She next considered whether any of ITP's or Wackenhut's prior, current, or planned activities could result in a "biased ground rules," "unequal access," or "impaired objectivity." A694-701.

IV. PAI Cannot Demonstrate The Existence Of An Actual Significant OCI

As we establish below, the contracting officer properly determined that ITP did not have access, through its subcontractor or its POIO Contract, to nonpublic competitively useful information.

A. ITP Did Not Have Access To Nonpublic Competitively Useful Information

In her OCI analysis, the contracting officer documented her findings in support of the determination that ITP did not have unequal access to competitively useful information as a result of its POIO Contract. A693. She explained that ITP was the incumbent contractor to OST's POIO Contract, which expired on May 31, 2009. Under this contract, ITP provided audits and assessments of training activities against DOE orders, manuals, and OST standard operating procedures and policies. A694. The contracting officer determined that although certain ITP employees had access to nonpublic information under its POIO contract, there was no evidence that this information was competitively useful. Specifically, she determined that "because of the ever evolving nature of operational readiness training and [opposition force], (i.e. scenarios and exercises must constantly change due to evolving threats) I found that any information ITP may have had access to would have been out-dated and would not have been competitively

useful.” A693.

The contracting officer further determined that even if the nonpublic information to which certain ITP employees had access were competitively useful, these employees had been effectively firewalled from the rest of ITP since January 2004. A702. Pursuant to this firewall, ITP senior management did not have any direct knowledge or information regarding the conduct of the OST audits and assessments because the ITP Team Leader, who worked independently from management and whose job performance was rated by externally contracted human resource and finance consultants, was placed in charge of the day to day activities and assignments. A703.

The contracting officer detailed her findings in support of her determination that ITP, through its subcontractor, Wackehenhut, did not have access to nonpublic competitively useful information. She explained that although Wackenhut had access to nonpublic information due to its performance as the incumbent contractor to the OST Support Services follow-on contract, that this information “did not create a disparity in the level of information that was available to all offerors.” A697. She addressed all nonpublic documents to which Wackenhut had access, including the OST Playbook and OST Lesson Plans. With regard to the OST Playbook, the contracting officer explained that it

contained processes and procedures specifically developed to assess and monitor OST Federal agent performance as it related to their duties and responsibilities in carrying out the OST mission. Id. The Integrated Product Team’s technical representative determined that the “Playbook ha[d] very little bearing on an offeror’s proposal because the vast majority of the information pertain[ed] to OST Federal Agent performance; as such, the Playbook was not central to the Government’s requirements for the Task Orders.” A697-698. The contracting officer agreed with the technical representative’s assessment because the solicitation did not require offerors to provide a technical approach for all three Task Orders to assess and monitor OST federal agent performance. A697.

With regard to the OST Lesson Plans, the contracting officer noted that although they were not provided to offerors, she did furnish offerors with the OST Lesson Plan Master Listing, which included a detailed list of the types of training courses offerors were expected to provide under the first sample Task Order. According to the Integrated Product Team’s technical representative’s expert opinion, “any offeror possessing sufficient knowledge of paramilitary training could provide an acceptable technical approach to conducting Task Order 1 based on the information provided in the RFP.” A698. The contracting officer agreed with the technical representative’s expert judgment. See id.

PAI's broad and conclusory allegations, however, are unavailing and do not support an OCI. PAI's Brief at 33-35. PAI raises issues that the contracting officer directly addressed, and provides no evidentiary support or legal argument that could undermine the contracting officer's analysis. First, the contracting officer explained that the three sample Task Orders upon which offerors were required to propose a technical approach, Agent Candidate Training, Operational Readiness Training, and Contractor Transportation and Utilization Program, were not previously performed by Wackenhut. A692. While the subject areas may have been similar to the services provided by Wackenhut, under much larger Task Orders, Wackenhut had not previously performed Task Orders of similar size, scope and complexity to the three sample Task Orders included in this solicitation. The contracting officer explained that she fundamentally altered and simplified the solicitation requirements. Id. Instead of requiring offerors to propose on 15 out of 16 Performance Work Statement Task Areas to be performed over a five year period as originally envisioned, offerors only had to address three sample task orders covering a 12 month period of performance or less. A692-693.

Additionally, the contracting officer mitigated any potential OCI by "leveling the playing field" for the second Task Order because she provided offerors with the performance objectives for Conduct Operational Readiness

training, which were not recurring, but constantly evolving due to the nature of operational training. A692-693, 695.

For the third Task Order, the contracting officer provided offerors with very specific information for three fictitious transportation scenarios and other information regarding the number of drivers and transportation assets necessary to complete each scenario as well as trip duration and locations. A693. These three fictitious scenarios were clearly not applicable to any specific current or former task, but were generic hypothetical tasks.

In any event, to the extent that Wackenhut possessed any competitively useful nonpublic information, Wackenhut was prohibited under its contract from disclosing restricted data and classified information to ITP. A699. The contracting officer found no evidence to suggest that Wackenhut ever disclosed sensitive information to any entity outside of the NNSA. See id. Indeed, the DOE's technical evaluation of ITP's cost proposal resulted in a total increase of 22,635 prime and subcontractor labor hours, which supports ITP's lack of access to the nonpublic information. A652-655.

Furthermore, the contracting officer explained how she furnished the direct productive labor hours for each of the Performance Work Statement's 16 Task Areas and an estimated training calendar. A692. This was done to "level the

playing field,” because the DOE did not provide details about Wackenhut’s support staffing, which was considered to be business proprietary. Id. In any event, the DOE wanted to evaluate each offeror’s unique technical approach to the three sample Task Orders, which would not have been feasible if offerors were required to mimic Wackenhut’s direct productive labor hours for each task.

Because PAI fails to provide any “hard evidence” undermining or contradicting the contracting officer’s rational determination that any nonpublic information ITP possessed was not competitively useful and that the contracting officer “leveled the playing field,” PAI has not met its burden to establish that ITP had unauthorized access to proprietary information or any other information that would give it a competitive advantage over another offeror.

B. ITP Was Not Afforded An Unfair Advantage

PAI’s allegations of an OCI remain unavailing because PAI also cannot establish that ITP, by allegedly having unequal access to that information, was afforded an advantage that was unfair. Arinc, 77 Fed. Cl. at 202. “The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gained by a potential offeror’s prior performance of a particular requirement. . . .” Id. at 203.

Indeed, to demonstrate unfair advantage based on 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 contractor, (ii) the awardee obtained materials related to the specifications or statement of work for the instant procurement, or (iii) some other ‘preferential treatment or . . . agency action’ has occurred.” Id. at 203-204.

In this case, PAI’s allegation that ITP, through Wackenhut and its POIO Contract, may have had a competitive advantage as a result of incumbency is without legal support. Mere incumbency does not result in unfair advantage. Id. at 203; see also Alabama Aircraft Industries, Inc.-Birmingham v. United States, 83 Fed. Cl. 666, 686 (2008) (holding that incumbent status by itself is insufficient to create an OCI).

CONCLUSION

The Government respectfully asks this Court to affirm the decision of the court below.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)2 OF THE
FEDERAL RULES OF APPELLATE PROCEDURE**

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, counsel for Appellee, the United States, certifies that this brief complies with Rule 28.1(e)(2)(B)(I), because, based on a word count by the word processing software, it contains 6,012 words.

March 22, 20109

Christopher L. Krafchek

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 5th day of March 2010, I caused to be delivered by United States mail (first class mail, postage prepaid) service copies of “CORRECTED BRIEF FOR APPELLEE, THE UNITED STATES” addressed as follows:

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