

MEMORANDUM FOR Army Materiel Command Attorneys

SUBJECT: Federal Court Protective Orders: When Are Counsel's Contacts Too Many?

1. **Introduction:** Recently, the U.S. Court of Federal Claims, Judge Horn, excluded a private attorney's access to proprietary and source selection sensitive information under a bid protest protective order. Hydro Engineering v. U.S., No. 96-564C, 1997 U.S. Claims LEXIS 51 (Fed. Cl. March 10, 1997). Specifically, the Court excluded the attorney after it found

. . . a significant risk of disclosure or inadvertent disclosure due to [the attorney's] existing and past, direct and indirect relationships with individuals and companies involved in, or potentially involved in, the procurement at issue, or in future related procurements.

Id., at *10 - *11. Although the Court's determination was very fact-specific, its analysis and conclusions are similar to the current protective order standard before the GAO. In short, the Court's action was based on following three areas of concern:

- (1) the attorney's intimate contacts with a potential competitor;
- (2) the attorney's pre-proposal representation of a potential competitor; and
- (3) the attorney's unwillingness to sever such contacts in future related procurements.

2. **Contacts:** Regarding the first area of concern, the attorney maintained a personal and professional relationship with two principals in a corporation related to the plaintiff's subcontractor. The first principal was the attorney's brother. The second principal was a corporate officer of both the subcontractor and the related corporation. Moreover, the Court noted that the attorney had not revealed these contacts in his application for admission to the protective order in the predecessor bid protest before the GAO. Id., at *11.¹

3. **Pre-Proposal Representation:** In addition, the Court found that the attorney "represented [the plaintiff's subcontractor] during the formation of a proposal to be submitted in the procurement . . ." Id. In this regard, the attorney wrote a letter

¹ The GAO also denied the attorney's admission to the protective order. See Hydro at *7.

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to the Contracting Officer, on behalf of the subcontractor, about various intended contractual requirements.² In addition, the subcontractor wrote approximately four pre-proposal letters to the Contracting Officer, apparently "copy furnishing" the attorney.

4. **Future Representation:** Finally, the Court noted that the attorney "indicated an unwillingness to sever any future relationships with potential or future offerors on procurements related to the one at issue." *Id.* Although the Court clearly considered this fact in reaching its decision, we cannot know whether the Court's decision would have been different had the attorney sworn off such future relationships.

5. **Practice Recommendation:** This case involved a small business. Its attorneys were solo or small-firm practitioners not involved routinely in a government contract practice. Prior to releasing sensitive information pursuant to a U.S. Court of Federal Claims protective order, government counsel should take reasonable steps to determine the nature and extent of an unfamiliar attorney's representation. Depending on the nature of the attorney's association with his or her client, there could be a heightened risk of inadvertent disclosure of protected material.



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² It was this correspondence upon which the GAO, in part, based *its* exclusion of the attorney from *its* protective order:

The record establishes that [the attorney] has communicated with the agency on behalf of [the protester's subcontractor] concerning the procurement which is the subject of this protest. In his October 13, 1995, letter to the agency, [the attorney] inquired about how [the subcontractor] was to respond and comply with various specifications in the solicitation Based on [the attorney's] letter, we believe that [the attorney] was engaged in competitive decision making on behalf of [the subcontractor].

Hydro at *7 - *8.