

***Office of Dispute Resolution for Acquisition***  
**Federal Aviation Administration**  
**Washington, D.C.**

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Protest of )  
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BAE Systems Technology Solutions & Services, Inc. ) Docket No. 10-ODRA-00542  
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Pursuant to Solicitation DTFAWA-09-R-SE2020 )

**DECISION AND ORDER**  
**ON CONSULTANT’S ADMISSION TO THE PROTECTIVE ORDER**

On September 3, 2010, Intervenor Booz Allen Hamilton, Inc. (“BAH”) filed an “Application for Access to Materials Under Protective Order for Independent Consultant,” (“Application”) seeking the admission of Ms. Margaret Worthington to the Protective Order dated August 25, 2010 (“Protective Order”), issued by the Office of Dispute Resolution for Acquisition (“ODRA”) in this Protest. Protester BAE Systems Technology Solutions & Services, Inc. (“Protester”) filed a timely objection (“Objection”) on September 8, 2010. For the reasons stated below, the ODRA denies the Objection and grants Ms. Worthington’s admission to the Protective Order.

The Protective Order states:

This Protective Order limits disclosure of certain material and information, submitted in the above-captioned proceeding before the Federal Aviation Administration Office of Dispute Resolution for Acquisition (“ODRA”), in order to protect proprietary and competition-sensitive information so that no party obtaining access to protected material under this Order will gain a competitive advantage thereby.

*Protective Order* at 1. A party objecting to a consultant’s admission to an ODRA Protective Order bears the burden to establish that: (1) the applicant in question is involved in competitive decision making for one of the parties; or (2) that admission to the Protective Order would create a significant risk of inadvertent disclosure of proprietary or competition-sensitive information. *Contract Dispute of Globe Aviation*

*Services Corp.*, 04-TSA-007 (Decision on Motion to Deny Access to Protected Materials); *see also Matter of Systems Research and Applications Corp; Booze Allen Hamilton, Inc.*, B-299818, B-299818.2, B-299818.3, B-299818.4 (September 6, 2007) (applying similar standard to a consultant’s application).<sup>1</sup> Determinations to grant or deny access “should be governed by the facts” presented rather than on *per se* standards based on the title of the applicant. *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468-9 (Fed. Cir. 1984).

In the present Protest, Ms. Worthington has certified that her client list of the past two years includes the following table entry:

<u>Client Name</u>	<u>Type of Services</u>
BAE Systems	Contract Termination (Complete); Vendor Analysis (Complete); Regulatory Compliance (Ongoing)

*Worthington Application* at attachment. Protester asserts that under paragraph 5 of the Protective Order, it is improper to grant access to any individual who “is employed by a party to the action or is working under contract to such party.” *Objection* at 2 (citing *Protective Order* at ¶ 5). Further, Protester asserts that Ms. Worthington has “access to large amount of BAE Systems proprietary and confidential information, and has learned about BAE Systems company-wide cost and pricing strategies.” *Id.* at 2. Protester’s counsel argues that the admission of Ms. Worthington “would pose an unacceptable risk of inadvertent disclosure of BAE Systems proprietary strategies and information to a direct competitor.” *Id.* at 3.

BAH’s counsel argues in a reply (“Reply”), filed on September 9, 2010, that Ms. Worthington’s work was for other parts of the “BAE Systems conglomerate that are indisputably *not* involved in this award or bid protest.” *Reply* at 1-2 (emphasis in the original). Indeed, according to BAH counsel, the ongoing work “involves a pricing

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<sup>1</sup> Although the FAA is not bound by the decisions of the Comptroller General, the ODRA has held that decisions in GAO bid protests may be viewed as persuasive authority insofar as the principles and rules announced in such cases are consistent with the AMS and ODRA case precedent. *See e.g., Protest of International Services, Inc.*, 02-ODRA-00224.

question at a company that was later acquired by BAE Systems (and then incorporated in its Land and Armaments division).” *Id.* at 2. BAH strives to minimize Ms. Worthington’s potential disqualification under paragraph 5 of the Protective Order by asserting that she “is not under a current written contract with BAE Systems for work ... with the company that was later acquired by BAE Systems.” *Id.* at 4. BAH argues that the Protective Order must be read in light of the holding in *U.S. Steel Corp, supra*, that the determination to grant or deny access must be based on the applicant’s “actual activity and relationship to the party.” *Reply* at 3. According to BAH, Ms. Worthington is not involved in BAE’s competitive decisions, and therefore not excluded from admission to the Protective Order. *Id.* at 3-4.

Both the Protester and BAH provided the ODRA with a second round of letters on this issue. *See Protester’s Second Letter* dated September 13, 2010, and *BAH’s Second Letter* dated September 14, 2010. These documents raise arguments similar to those raised before, and like the initial Objection and Reply, do not provide the ODRA with declarations, affidavits, contemporaneous records, or other materials that could establish facts to support the arguments pertaining to the Objection. In fact, all four of the letters regarding this Objection contain merely of arguments by counsel, which are not evidence. *See generally, Conservation Force, et al., v. Salazar*, Civil Action No. 09-496 (JDB), slip op. at n. 9, 2010 US. Dist. LEXIS 56116, \*18 (D. D.C. June 7, 2010) and cases cited therein.

The evidentiary record before the ODRA, therefore, consists only of the certified statement by Ms. Worthington herself on the standard ODRA application. Ms. Worthington’s application alone does not establish that she is involved in competitive decision making for any party. It also does not, by itself, demonstrate a significant risk of inadvertent disclosure of proprietary or competition-sensitive information. Moreover, Ms. Worthington indicates that she in no way participates in "competitive decisionmaking," and nothing in the factual record contradicts this statement. *See U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984). Ms. Worthington further states that she will abide by the terms of the Office of Dispute Resolution for

Acquisition's Protective Order dated August 25, 2010. The weight of the actual evidence before the ODRA, therefore, affirmatively supports admitting Ms. Worthington to the Protective Order. Recognizing the burden imposed by precedent on an objecting party, the ODRA denies the objection.

Accordingly, the Office of Dispute Resolution for Acquisition accepts the signed statements of Ms. Worthington, and hereby allows her access to protected material in accordance with the provisions of the Protective Order.

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John A. Dietrich  
Dispute Resolution Officer  
Office of Dispute Resolution for Acquisition

September 22, 2010