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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: PWC Logistics Services Company KSC(c)

File: B-310559

Date: January 11, 2008

DECISION

PWC Logistics Services Company KSC(c) protests the award of a contract to Anham, LLC, under request for proposals (RFP) No. W91GXZ-07-R-0011, issued by the Joint Contracting Command–Iraq/Afghanistan, for the operation and maintenance of two wholesale distribution center warehouse and staging area operations. The protester argues that the agency’s evaluation and selection of Anham’s proposal for award were unreasonable.

We dismiss the protest because of a violation of the terms of the GAO protective order issued in connection with this protest and other actions by the protester inconsistent with the integrity of GAO’s bid protest process.

The RFP provided for the award of a cost-plus-award-fee, indefinite-delivery indefinite-quantity contract, with certain fixed-price elements, on a “best-value” basis. The source selection official selected Anham’s proposal with an evaluated cost/price of \$115,267,083 (the lowest evaluated cost/price) for award. Agency Report, Tab 12, Source Selection Decision, at 5. PWC’s proposal was higher-rated than Anham’s and higher-priced, with an evaluated cost/price of \$[DELETED]. In its protest, PWC primarily argues that the agency failed, in its evaluation of Anham’s proposal, to perform reasonable cost and price realism analyses, and that the agency essentially, and improperly, awarded the contract to Anham as the offeror submitting the low-priced, technically acceptable proposal.

Pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.4(a) (2007), our Office issued a protective order in connection with this protest that allowed for the limited release, to those individuals admitted to the order, of protected information, such as proprietary, confidential, or source-selection-sensitive material, as well as other information, the release of which could result in a competitive advantage to one or more firms. Protective Order, Oct. 17, 2007. In this regard, our Office, based upon our review of the applications submitted and in the absence of any objection,

admitted under the protective order attorneys retained by PWC and Anham to represent them in the protest, as well as consultants retained to assist these attorneys in the protest.

The agency submitted its administrative report, which included, among other things, the agency's legal memorandum and contracting officer's statement, Anham's proposal, the agency's documentation of its evaluation under the RFP's technical and cost/price factors, and documentation of the questions posed and responses received from Anham during discussions. These documents, with limited exceptions, were each designated in the agency report as "PROTECTED MATERIAL TO BE DISCLOSED IN ACCORDANCE WITH GAO PROTECTIVE ORDER."

Comments on the agency report were received from protester's and intervenor's counsel; the comments as well as the attached supporting documents were clearly designated as "protected" and to be disclosed only in accordance with the protective order issued by our Office. Our Office subsequently requested that the agency submit a supplemental report by December 3, and informed the parties that any supplemental comments from the protester and intervenor were to be filed with our Office by December 7. The agency filed its supplemental report, which again was clearly designated as protected material to be disclosed only in accordance with the protective order issued by our Office, and the protester's and intervenor's supplemental comments, also designated as protected and subject to release only in accordance with our protective order, were submitted as requested on December 7.

On Friday, December 7, a partner of the law firm retained by PWC to represent it in this protest, who had been admitted to the protective order, informed our Office and intervenor's counsel, by telephone and e-mail, that two documents that contained protected information and that were designated as protected had been "inadvertently forwarded [on November 29 by e-mail] to certain individuals within PWC under the misunderstanding that they were ready for release to the public."¹ Partner's E-mail to GAO and Intervenor's Counsel (Dec. 7, 2007). The partner stated that an associate of the law firm who had been admitted to the protective order was responsible for the disclosure of the protected material to PWC personnel by e-mail, and that as soon as the associate realized, on December 5, that this "error" had been made, the associate had advised the PWC recipients of the e-mail containing protected material "to destroy the e-mail and to advise anyone else who received the e-mail to do the same." Id. The partner added in this e-mail that the recipients had also been asked "to tell us whether they read the contents and to certify that they have destroyed the e-mail and its contents."² Id.

¹ It is unclear from the record whether the Army was notified at this time, as the Army is not listed on the e-mail as a recipient.

² The record includes an e-mail dated December 5, sent by the partner to two PWC employees (subsequently identified as PWC's Chief of Contract Administration and

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The partner's December 7 e-mail to our Office and intervenor's counsel also provided as attachments the two documents that had been released to PWC personnel. The first document was a proposed redacted version intended for release to Anham only of PWC's comments on the agency report (referred to here as the protected comments).³ This document is 17 pages long, and discusses many aspects of Anham's proposed cost/price and technical approach. The protected comments included three attachments. One of the attachments was prepared by a consultant retained by PWC and admitted under the protective order to assist, under the direction and control of PWC's outside counsel, in the representation of PWC in this protest. The attachment prepared by the consultant is 20 pages in length, and provides, among other things, a number of excerpts from Anham's proposal, including Anham-prepared "Cost Breakdown worksheets" from both Anham's initial and final revised proposals, a table depicting Anham's proposed staffing, and a table prepared by Anham titled "Comparison of Evaluated Price to Supporting Cost Data." Protected Comments, exh. 2, at 6-7, 12, 16. The second protected document that was disclosed to PWC personnel was a proposed redacted version intended for release to Anham only of PWC's response to Anham's consultant's comments on the agency report (referred to here as the protected response). This document is three pages in length, and includes one attachment of two pages that had been prepared by the same consultant that had prepared the above-described attachment to the protected

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PWC's Vice President and General Counsel), making the referenced requests. PWC Submission (Dec. 17, 2007), Tab 32, Partner's E-mail (Dec. 5, 2007). The record also includes an e-mail dated December 6 from another associate of the law firm who had been admitted to the protective order (referred to here as the second associate) to PWC's Chief of Contract Administration. This e-mail "follow[ed] up" on the partner's December 5 e-mail, and requested "statements from each person who received the documents indicating (1) what documents they received, (2) to what extent they reviewed the documents, (3) whether they distributed them to other persons, and (4) confirming that they destroyed the documents." *Id.*, Tab 34, Second Associate's E-mail (Dec. 6, 2007).

³ It is not unusual for counsel of the parties in a protest to prepare and agree upon differing redacted versions of protected documents for release to their respective clients. These redacted versions of documents differ from the redacted version of the same document prepared for public release in that a document prepared for release to, for example, the protester (that is, the client rather than counsel) may include information that is proprietary to the protester, whereas a redacted version for public release would not. The associate's statements here suggest that he may not have been aware of this practice. It appears here that Anham's outside counsel prepared the initial proposed redacted versions of the documents for release to Anham only, with PWC's outside counsel and the Army participating in the process. Even if those proposed redactions had been approved, the documents would not have been releasable to PWC or its employees.

comments. The document and attachment do not include worksheets or excerpts from Anham's proposal, but do discuss a number of features of Anham's technical approach, including "Anham's 'innovative' work approaches." Protected Response at 2. Both the protected comments and the protected response are designated as "Proposed Anham Version" on their first page by handwritten notation, and include on the bottom of each page the following legend: "PROTECTED MATERIAL TO BE DISCLOSED ONLY IN ACCORDANCE WITH GOVERNMENT ACCOUNTABILITY OFFICE PROTECTIVE ORDER."

The GAO attorney assigned to the protest contacted the partner by telephone on Monday, December 10, and in accordance with GAO's practice where an improper disclosure of protected information has been alleged or reported, requested that GAO, intervenor's counsel, and the Army be provided with a detailed explanation as to exactly what had happened regarding the disclosure of the protected material to the PWC personnel, as well as the efforts made to mitigate the effects of the disclosure of the documents containing Anham's proprietary information to PWC personnel by recovering or destroying the protected documents. The Army and intervenor's counsel were informed of this request.

On Tuesday, December 11, the associate provided a three-page letter that he characterized as "a detailed description of the inadvertent release of the protected information to PWC." PWC Submission (Dec. 11, 2007) at 1. The associate explained that he had "believe[d]" that he had reached an agreement with Anham's counsel and the Army as to redacted versions of the protected comments and the protected response that were suitable for public release, and on November 29, he had sent these documents to two PWC employees whom he identified only by proper name.⁴ Id. at 2. The associate explained that he "discovered the inadvertent release of protected information to PWC on Wednesday, December 5th" when he was provided by Anham's counsel with a "heavily redacted version" of another document for public release that was inconsistent with the limited redactions in an earlier version

⁴ The associate actually sent two separate e-mails to the PWC personnel on November 29 to forward these two documents. The cover message on the e-mail that included the protected comments as one of the attachments provides as follows:

Attached please find the redacted version of PWC's and Anham's comments. I think you will find that there is a lot of substance in these documents which should give you a much better picture of what is being argued by all of the parties. Please share with whoever you deem appropriate.

PWC Submission (Dec. 17, 2007), Tab 28, Associate's E-Mail to PWC's Chief of Contract Administration and PWC's Vice President/General Counsel (Nov. 29, 2007). The copies of the associate's November 29 e-mails provided to our Office on December 17 also revealed that the partner was a recipient of these e-mails. Id.

of the same document that had been proposed for release to Anham only.⁵ Id. The associate adds that at this time he “realized” and then “confirmed” that the proposed redacted version of the protected comments and the protected response that he had sent to PWC personnel should not have been disclosed. Id. In this letter, the associate also provided additional explanation regarding the disclosure of the protected documents, as well as the efforts made to ensure that the PWC personnel “destroy” their copies of the protected comments and protected response. Id.

The associate’s explanation also included a table that identified “the names of the individuals at PWC who received the documents, which document(s) they received, the extent to which they reviewed the document(s), and whether they destroyed the documents.” Id. at 3. The table listed six PWC employees by proper name (but without title or position held), including the later-identified Chief of Contract Administration and Vice President/General Counsel, that had “[r]ead” or “[s]canned” the protected comments and/or protected response. Id. Specifically, the table indicated that PWC’s Chief of Contract Administration and PWC’s Vice President/General Counsel had “[r]ead” “[b]oth of the [d]ocuments.” The table further provided that one of the remaining individuals had “[r]ead” the protected response, and one had “scanned” the protected response, and that another of the individuals identified had “[r]ead” a document and another had “[s]canned” a document, but that neither of these individuals could “remember which document they received.” Id. The associate’s explanation added that although these two individuals could not remember which document they had received, it was “believed to be [the protected] [r]esponse.” Id. The associate’s explanation concluded by stating that “[w]e are continuing to determine whether any other individuals received any or both of the documents,” and that “[w]e will update you and other counsel if and when we find any other recipients.” Id.

On December 12, Anham’s counsel submitted a request for dismissal of PWC’s protest in light of the violation of the terms of the protective order and in order “to protect the integrity of the bid protest process.” Anham’s Request for Dismissal

⁵ Neither the associate nor the partner has explained, with the exception of that set forth in the text here, how the associate could have reasonably understood that an agreement had been reached with Anham’s counsel and the Army that the proposed redacted documents that were provided to PWC were suitable for public release, given the limited nature of the redactions; the significant amount of information that was clearly proprietary to Anham that remained in them, in particular, in the protected comments; and the “Proposed Anham Version” notation and the “protected material” legend that remained on the documents. Based on our Office’s experience, as a general matter the “protected material” legend is either deleted or crossed out, or modified by denoting that the document is for release to a specific party only, prior to the document being released publicly or to the appropriate party or parties.

(Dec. 12, 2007) at 1. Anham argues that “[t]he disseminated documents contained tremendous amounts of confidential information about Anham’s proposal and general business model,” including, for example, “Anham’s direct and indirect rates, subcontractor rates and identities, warehouse operations logistics, statistics bases for technical innovations, detailed staffing plans, software identification and implementation schedules, [and] equipment and vehicle fleet details.” Id. at 1-2. Anham asserts that “the proprietary nature of this information throughout the documents was abundantly obvious,”⁶ and, while not accusing PWC’s outside counsel of intentionally disclosing the protected comments and protected response, asserts that “PWC’s retention of obviously proprietary data of its competitor and legal adversary was knowing and intentional.” Id.

On December 13, the GAO attorney handling the protest convened a conference call with counsel for PWC, Anham, and the Army to discuss the apparent violation of the protective order, and his view that the protester’s December 11 explanation was inadequate and he requested a more complete explanation. Among other things, the GAO attorney noted that the explanation lacked details regarding when the documents were received by the PWC personnel, whether they were provided to any additional PWC personnel, whether the PWC personnel who had received the documents had made and/or retained any copies of the documents, and what positions the PWC personnel identified held within PWC. The GAO attorney noted that he was particularly concerned with the apparent fact that certain PWC personnel had knowingly read and forwarded to other PWC personnel the protected comments and protected response, even though these documents were clearly labeled as protected and subject to the protective order issued by our Office. The GAO attorney added that he was also concerned by the fact that nearly 2 days (December 5 to December 7) passed from the time that protester’s counsel became aware of the disclosure of the protected documents to PWC personnel and the time when protester’s counsel notified GAO and the intervenor that the disclosure had occurred.

Accordingly, on December 17, the partner provided our Office, Anham’s counsel, and the Army with a more detailed description of the relevant events. This submission was supported by the declarations of the partner, the associate, the second associate, and 17 PWC employees, including PWC’s Vice President/General Counsel and PWC’s Chief of Contract Administration, and copies of numerous e-mails.⁷

⁶ Our review of the improperly disclosed documents confirms the obviously proprietary nature of much of their contents.

⁷ Some of the copies of the e-mail “strings” provided by the partner under the protective order were incomplete and labeled as “redacted.” When our Office questioned these omissions, our Office, intervenor’s counsel and the Army were informed that the redactions were made based upon the partner’s claim that portions of the e-mail “strings” contained information that is “unrelated” to the matter at hand
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Anham's counsel and the Army submitted their views regarding the protective order violation and request for dismissal on December 19, and PWC's counsel commented on those views on December 20. In their December 19 submissions, both Anham's counsel and the Army point to what they believe are numerous inconsistencies in the factual accounts and declarations submitted by the PWC personnel and their counsel, and argue that certain of the claims made by PWC personnel in their respective declarations are, at best, incomplete or implausible. Anham's counsel, now joined by the Army based upon its review of PWC's December 11 and December 17 submissions, argues that, at a minimum, PWC's protest should be dismissed.

The protective order process is essential to the proper functioning of GAO's bid protest process.⁸ The terms of our protective order limit "disclosure of certain material and information submitted in the . . . protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure." Protective Order, Oct. 17, 2007. The order "applies to all material that is identified by any party as protected, unless GAO specifically provides otherwise," and strictly limits access to protected material only to those persons authorized under the order. *Id.* ¶¶ 1-3. The protective order also provides that "[e]ach individual covered under this protective order shall take all precautions necessary to prevent disclosure of protected material," including, but not limited to, "physically and electronically securing, safeguarding, and restricting access to the protected material in one's possession." *Id.* ¶ 6. Implicit in this is the duty of counsel to familiarize the client with the core obligations of those individuals admitted under the protective order, including the obligation to safeguard materials that are identified as protected from disclosure to individuals not admitted to the protective order, including, of course, the client. The protective order and our Bid

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and was "protected by the attorney-client privilege and the attorney work product doctrine." Partner's Letter (Dec. 18, 2007) at 1. Accordingly, our Office, as well as intervenor's counsel and the Army, are unaware of much of the contents of these e-mail "strings." For example, the associate's November 29 e-mails, forwarding the protected documents to PWC, are each followed in the record by four pages that are completely blank with the exception of the notation "redacted."

⁸ In order to develop a complete record upon which our Office can base a bid protest decision, our Office believes that "the protester should be given access to all information considered by the procuring agency in making the determination which forms the basis of the protest," and that "[t]he availability of this information provides the protester with a full opportunity to present its side of the case." This "assures that [our Office has] before it a complete record of the protested procurement as developed by the interplay between the protester and the agency." The "issuance of protective order . . . is intended to meet this need for a full record." Bid Protest Regulations, Final Rule, 56 Fed. Reg. 3759 (1991).

Protest Regulations provide that any violation of a protective order may result in the imposition of such sanctions as GAO deems appropriate. Id. ¶ 8; 4 C.F.R. § 21.4(d).

Clearly, there has been a violation of the protective order here. Although the partner and the associate explain that certain circumstances regarding the process of creating redacted party-unique versions of documents led to the violation, there is no question, and it is not disputed by any of the attorneys involved, that protected versions of the protected comments and the protected response, containing information proprietary to Anham, were improperly disclosed to PWC personnel. As noted above, our Regulations provide for the imposition of appropriate sanctions in the case of a violation. Consistent with our Office's practice, any sanctions concerning the individuals admitted to the protective order here will be separately considered by our Office subsequent to, and separate from, the resolution of the protest.

This case, however, involves more than a protective order violation. Although the protective order itself applies only to the individuals admitted under it, our bid protest forum cannot function effectively if the parties before us--both counsel admitted to a protective order and their clients who have not been admitted to it--do not treat protected information appropriately. For that reason, our Office's concern, when nonpublic information obtained through our protective order has been improperly released, goes beyond the individuals admitted to that order. We view it as self-evident that a participant in our protest process who was not admitted to a GAO protective order cannot retain a document, however obtained, if the document bears a legend clearly identifying it as protected. In our view, that individual's responsibility, once he or she sees the protective legend, is to immediately close the document, advise his or her counsel admitted to the protective order of the disclosure, and turn the protected document over to counsel (or destroy it); retaining the document is improper.

Based on our review of the record, we agree with intervenor's counsel and the Army that the actions of the PWC employees to whom the protected material was disclosed were inconsistent with, and undermined, the integrity of our Office's bid protest process. Although a number of facts remain unclear or are disputed, all parties acknowledge that PWC's Chief of Contract Administration and PWC's Vice President/General Counsel each improperly received from the associate on November 29 the protected comments and protected response. It is also clear that these documents bore on each page the notation "PROTECTED MATERIAL TO BE DISCLOSED ONLY IN ACCORDANCE WITH GOVERNMENT ACCOUNTABILITY OFFICE PROTECTIVE ORDER," and that even a cursory review of the protected comments would reveal that they contained technical, cost and price information proprietary to Anham. It is also undisputed that these documents remained in PWC's Chief of Contract Administration's e-mail (and thus his possession and control) until at least December 6, and in PWC's Vice President/General Counsel's e-mail (and thus his possession and control) until at least December 8 (the protected response) and

December 13 (the protected comments), and that at least the protected response was provided to at least 10 other PWC employees.⁹

Moreover, PWC concedes that its Vice President/General Counsel forwarded, at a minimum, the protected response to three other PWC personnel (including PWC's Chief of Contract Administration), and that at least one of these individuals (other than PWC's Chief of Contract Administration) read, to some extent, the protected response. PWC Submission (Dec. 17, 2007), Tab 5, Declaration of PWC Vice President/General Counsel, at 3; Tab 7, Declaration of PWC Executive Regional Director Middle East, at 4-5. Additionally, it is clear from the record that PWC's Chief of Contract Administration forwarded the protected response, at a minimum, to 10 other PWC personnel (including PWC's Vice President/General Counsel), and that at least 5 of these individuals read, to some extent, the protected response. PWC Submission (Dec. 17, 2007), Tab 4, Declaration of PWC's Chief of Contract Administration, at 5; Tab 12, Declaration of PWC's Senior Contracts Manager-Iraq, at 3; Tab 15, Declaration of PWC's Contract Manager, at 3; Tab 18, PWC's Deputy Program Manager, at 3; Tab 19, Declaration of PWC's Chief Executive Officer and President International, at 3; Tab 20, Declaration of PWC's Program Manager, at 3. Additionally, with the exception of the declaration of PWC's Vice President/General Counsel, there is no explanation in any of the declarations submitted by the PWC personnel of why the declarant(s) believed it permissible to read or even possess (and, in some instances, forward to other PWC personnel) documents labeled as protected and subject to the protective order issued by our Office.¹⁰

⁹ PWC's Vice President/General Counsel explains that when he was instructed by the associate on December 5 to delete the documents from his e-mail, PWC's Vice President/General Counsel was "traveling . . . and did not have [his] luggage with [him,] which contained the power cord to [his] laptop." PWC's Vice President/General Counsel adds that when he arrived at his destination, he "discovered that his luggage had been lost," and that he "was not able to get another power cord until December 8." At that time, he deleted and emptied from his deleted items folder "one of [the associate's] e-mails." However, it was not until December 13, when "reviewing [his] emails related to this matter," that PWC's Vice President/General Counsel noted that the e-mail, which "contained two attachments titled PWC's Comments and Anham's Comments," remained in his "deleted items folder." According to PWC's Vice President/General Counsel, the e-mail that "contained two attachments titled PWC's Comments and Anham's Comments" was deleted from his computer at that time on December 13. PWC Submission (Dec. 17, 2007), Tab 5, Declaration of PWC's Vice President/General Counsel, at 4.

¹⁰ PWC's Vice President/General Counsel explains that, when he received the associate's e-mails that included as attachments the protected comments and the protected response, he inquired "whether there were to be any further redactions before [PWC's Vice President/General Counsel] looked at the attachments," and was informed by the associate, also on November 29, that "the attachments had been
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Furthermore, as argued by Anham's counsel and the Army, other facts as set forth by the partner, the associate, and certain PWC personnel are internally inconsistent. For example, as noted previously, the associate represented in his December 11 explanation (prior to the intervenor's request for summary dismissal and our Office's request for a more complete explanation) that PWC's Vice President/General Counsel and PWC's Chief of Contract Administration "[r]ead" both the protected comments and the protected response. However, in his December 17 submission to our Office, the partner asserts that "it appears that neither" PWC's Vice President/General Counsel nor PWC's Chief of Contract Administration had "read" the protected comments. Protester's Submission (Dec. 17, 2007) at 2, 7. This assertion is apparently based on the December 17 declaration of PWC's Vice President/General Counsel, where, in direct contradiction of the previous representation, he states that he had "deleted" without reading the e-mail containing the protected comments based upon his "belief" that the e-mail was a duplicate of the associate's e-mail that included the protected response as an attachment. Protester's Submission (Dec. 17, 2007) at 6-7; see Tab 5, Declaration of PWC's Vice President/General Counsel, at 3. The partner also notes that, according to PWC's Chief of Contract Administration's December 17 declaration, that individual did not open the attachments to the e-mails from the associate (contradicting the associate's December 11 submission), but reviewed the attachments to the e-mail that he received from PWC's Vice President/General Counsel, which assertedly only contained the protected response, and then forwarded this attachment to the 10 PWC employees.¹¹ Protester's Submission (Dec. 17, 2007) at 7; see Tab 4, Declaration of PWC's Chief of Contract Administration, at 3-4.

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approved for release and [the associate] should have removed the 'protected' legend from the attachments." PWC Submission (Dec. 17, 2007), Tab 5, Declaration of PWC's Vice President/General Counsel, at 8; see Tab 2, Declaration of Associate, at 5. It is not clear why the Vice President/General Counsel thought it necessary to ask the question if he had not yet "looked at" the attachments, particularly given that the associate had already advised him that they could be read and distributed to "whoever you deem appropriate." See PWC Submission (Dec. 17, 2007), Tab 28, Associate's E-Mail to PWC's Chief of Contract Administration and PWC's Vice President/General Counsel (Nov. 29, 2007).

¹¹ This modification of PWC's position has significance because protester's counsel argues that the protected response, which was admittedly distributed within PWC, did not contain much, if any, information proprietary to Anham that PWC could use to its competitive advantage. However, we agree with Anham's position regarding the proprietary nature and usefulness of the information set forth in the protected version of the protected response and the competitive harm that may have been caused by its disclosure. In this regard, Anham's counsel points to references in the protected response that disclose five different aspects of Anham's proprietary approach. Intervenor's Request for Dismissal (Dec. 12, 2007), at 1-2; attach. A, at 2-3.

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The partner explains the discrepancy between the associate's December 11 explanation to our Office that unequivocally stated that both PWC's Vice President/General Counsel and PWC's Chief of Contract Administration had "[r]ead" the protected comments, and the later assertions that neither PWC's Vice President/General Counsel nor PWC's Chief of Contract Administration had read or reviewed the protected comments, by stating that at the time the December 11 explanation was submitted, counsel for PWC, "having had little ability to interview the two gentlemen, . . . perhaps too hastily, chose to be conservative and stated that both recipients had read 'both of the documents.'" Protester's Submission (Dec. 20, 2007) at 7. The partner asserts here that after "talking with [PWC's Vice President/General Counsel and PWC's Chief of Contract Administration] at length, it became apparent that neither of them had read the [protected] [c]omments and they so declared."¹² Id.

In our view, the partner's explanations do little to clarify the issue. For example, they do not adequately explain why the recollections of PWC's Vice President/General Counsel and PWC's Chief of Contract Administration, as to what occurred between November 29 and December 5, were less accurate on December 11 than they were in their declarations of December 17. Nor do we find the partner's explanation of December 17 persuasive, given, among other things, the statement in PWC's Chief of Contract Administration's declaration that he "remember[ed] the attachments seeming to do an effective job of responding to the assertions it stated were made by Anham" (which suggests through the use of the plural "attachments" that he also read the more detailed protected comments).¹³

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We note that no such argument is made (or could reasonably be made) by protester's counsel with regard to the protected comments, which included discussions of Anham's proposed cost/price and technical approach, as well as "Cost Breakdown worksheets," a table depicting Anham's proposed staffing, and a table prepared by Anham titled "Comparison of Evaluated Price to Supporting Cost Data."

¹² As explained previously, the partner requested by a December 5 e-mail to PWC personnel that the recipients "tell us whether they read the contents" of the documents, and the other associate "followed up" on the partner's request, by e-mail on December 6 to PWC's Chief of Contract Administration, by requesting detailed statements from PWC personnel who received the protected documents. We thus find puzzling, if not troubling, both the assertion that haste caused the December 11 statement that the two individuals had read the documents and the December 20 withdrawing of that statement after counsel talked over the matter "at length" with the individuals.

¹³ Another inconsistency in the record concerns the associate's representation in his December 11 explanation that the protected comments and the protected response were improperly disclosed to 6 PWC personnel, whereas in the partner's

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PWC Submission (Dec. 17, 2007), Tab 4, Declaration of PWC's Chief of Contract Administration, at 4.

Leaving aside the inconsistencies, we can return to the undisputed facts. Employees at PWC who inappropriately received the two protected documents retained them for approximately one week, until counsel directed them to destroy them. Some of those PWC employees read, to some extent, at least one of the documents; some of them then disseminated at least one of the documents to other PWC employees. While the protester (both the client and counsel) would have us focus on whether the individuals admit "reading" or only "scanning" the protected documents, on how long this action lasted, on whether anyone remembers the contents of the protected documents, and on whether only one, rather than both, of the protected documents were looked at, these are all irrelevant to the fundamental question of whether the individuals acted improperly by retaining the documents, since even a short glance at any page of either document would ensure that the protected legend was seen.

We turn then to consideration of the request that the protest be dismissed because of this improper action. We have recognized that where a protester's actions undermine the protective order's effectiveness, and thereby the integrity of our Office's bid protest process, it is appropriate to consider dismissing the protest to protect the integrity of that process. We view our authority to impose dismissal or other sanctions as inherent, as do courts.¹⁴ Network Sec. Techs., Inc., B-290741.2, Nov. 13, 2002, 2002 CPD ¶ 193 at 8; see Roadway Express Inc. v. Piper, 447 U.S. 752, 754 (1980); Reid v. Prentice-Hall, 261 F.2d 700, 701 (6th Cir. 1958) ("[e]very litigant has the duty to comply with reasonable orders of the court, and if such compliance is not forthcoming, the court has the power to apply the penalty of dismissal").

We recognize that dismissal is a severe sanction, and that it should be employed only in the rarest of cases. Indeed, we are acutely aware, and it weighs against the dismissal, of the general public policy favoring a decision on the merits. Balanced against these factors are a number of other factors that lead us to conclude that dismissal is appropriate here. As discussed below, those factors are the inadequacy of lesser available sanctions, the protester's (as opposed to its counsel's) responsibility for what occurred, the gravity of what occurred and the prejudice to

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December 17 explanation the number of PWC personnel that had received at least one of the two documents had grown to 12.

¹⁴ Although the parties obviously disagree as to whether dismissal of the protest here is appropriate, each recognizes our inherent authority to dismiss a protest where a protective order violation has occurred should the circumstances warrant it. See PWC Submission (Dec. 17, 2007) at 13; PWC Submission (Dec. 20, 2007) at 4; Anham's Request for Dismissal (Dec. 12, 2007) at 1; Army's Request for Dismissal (Dec. 19, 2007) at 7.

the intervenor and the agency resulting from it, and the salutary deterrent effect of dismissal on others who might be tempted to such conduct in the future. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976); Alaska Pulp Corp. v. United States, 41 Fed. Cl. 611, 614-15 (1998); Griffin & Dickson v. United States, 16 Cl.Ct. 347, 351 (1989).

A number of “lesser sanctions” considered by the courts, such as the imposition of fines or costs, are unavailable to our Office, and other lesser sanctions are, in our view, inadequate.¹⁵ In particular, the possible “lesser sanction” of admonishment or other measures aimed at PWC’s outside counsel who are admitted to the protective order do not address the conduct of the protester itself, which, as set forth above, we find troubling. Those employees of the client, not their outside counsel, are responsible for their conduct, and a sanction directed at counsel does not reach that conduct. Moreover, the PWC employees had at least constructive notice, from both our Bid Protest Regulations and our decision in Network Sec. Techs., Inc., *supra*, that a protester’s actions in the context of a violation of the protective order could result in dismissal of the protest. Hence, PWC cannot view our consideration of dismissal for the mishandling of protected information as unfair or unexpected.

Regarding prejudice, protester’s counsel, in arguing that dismissal is not appropriate, points out that the PWC employees that submitted declarations that recall receiving the protected comments and/or the protected response, state that they have little or no recollection of the contents of the protected documents, and that a number of the PWC personnel state in their declarations that they do not even recall reading to any extent the protected comments or the protected response. Counsel for the protester argues that because the PWC personnel cannot recall the contents of the protected comments and the protected response, there was little or no harm caused by the disclosure of the protected documents. Protester’s counsel explains that the PWC personnel did not read the protected documents because they were either too busy, or because PWC does not view Anham (the awardee of the subject procurement, for which PWC was the incumbent contractor) as a major competitor. PWC Submission (Dec. 20, 2007) at 9. Protester’s counsel concludes that, because in his view Anham has suffered no competitive harm from the disclosure of the protected comments and protected response to PWC personnel, it would be inappropriate to dismiss the protest.

¹⁵ Relevant dismissal decisions of the federal courts generally concern violations of discovery orders. A key concern stated in those decisions is the courts’ ability to “achieve the orderly and expeditious disposition of cases” through the management of their dockets. See, e.g., Link v. Wabash Railroad Co., 626 U.S. 626, 630-31 (1962). Our primary concern here is not the management of our docket, but rather, and more importantly to our forum, the protection of the integrity of the bid protest process itself, of which the administration of, adherence to, and enforcement of protective orders is a critical part. See 31 U.S.C. §§ 3553(f)(2), 3555(a) (2000); 4 C.F.R. § 21.4.

Given the self-serving nature of the declarations relied on in this argument by counsel, and our agreement with the Army and intervenor that the declarations and explanations submitted are both incomplete and inconsistent, we find them to be of little probative value. Moreover, unlike the protester's focus on whether the various PWC employees who received the protected information read it, merely skimmed it, or forgot what they did read, our analysis of prejudice should focus more on the nature of the information provided to those employees and the length of time that they retained it. As discussed above, the information included in the protected comments, and to a lesser extent, the protected response is sensitive and proprietary to Anham, so that, faced with its undisputed transmission to PWC employees and their retention of it, we find that the potential for prejudice to Anham was significant.

Finally, we return to our concern for protecting the effectiveness of the protective order process and the integrity of our bid protest system. Private parties and agencies whose information, whether proprietary or source-selection-sensitive, is provided under the aegis of our protective orders need to have the assurance that our Office will be vigilant in protecting that information, to the extent that we are able to do so. Any individual who might be inclined to show little respect for the protective order process must know that a lack of due care in the handling of protected information will not be tolerated and may lead, in the appropriate circumstances, to dismissal of a protest. Having considered the entire record, we conclude that that is the appropriate course here.

The protest is dismissed.

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General Counsel