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EXPERT ANALYSIS

Elevating Form Over Substance: OCI Waiver Challenges at GAO

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The Government Accountability Office (GAO) has exhibited little interest in evaluating the basis for agency decisions to waive organizational conflicts of interest (OCI).

Where protesters have challenged agency waiver determinations, GAO has limited its analysis to only a perfunctory review of whether the agency met all procedural requirements for properly waiving an OCI. GAO has entirely avoided any meaningful consideration of whether the agency's waiver was actually warranted.

As a result, government contractors raising OCI allegations are faced with increased uncertainty.

On the one hand, an agency's decision to award a contract to a firm with a potential or actual unmitigated OCI is prejudicial error that should preclude that firm from receiving a contract award.

On the other hand, because the Federal Acquisition Regulation (FAR) allows agency heads to approve a waiver of an OCI, even if the protester succeeds on its OCI allegations, the agency could, nevertheless, allow the award to stand.

In April 2011, the Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) issued a proposed rule to amend the FAR to provide revised guidance regarding OCIs. 76 Fed. Reg. 23,236.

Among other things, this proposed rule would have added much needed teeth to the FAR's otherwise ineffectual waiver provisions by clarifying when waiver was justified and by requiring contracting officers to maintain a more robust record for waiver determinations. *Id.* at 23,246.

The proposed rule, however, never made any headway, floundering in the regulatory review process for years — until now. Recent developments suggest that OCI reform may finally be on its way, with the potential to add a meaningful check on agency discretion to waive OCIs.

THE FAR'S OCI REQUIREMENTS

The FAR recognizes three distinct types of OCIs: (1) unequal access to information; (2) biased ground rules; and (3) impaired objectivity. FAR 9.505-2, -3, -4; *Aetna Gov't Health Plans, Inc., Found. Health Fed. Servs., Inc.*, B-254397 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 11-12.

To protect the integrity of public procurements and to ensure fairness for offerors and prospective offerors, agency contracting officers must "[i]dentify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible," and "[a]void, neutralize, or mitigate significant potential conflicts before contract award." FAR 9.504(a).

Unequal access to information OCIs

Unequal access to information OCIs involve situations where a firm has gained access to nonpublic, competitively useful information through the performance of one government contract that may

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confer a competitive advantage on that firm as an offeror in a competition for another government contract. FAR 9.505-4; *Aetna*, 95-2 CPD ¶ 129 at 11; *L-3 Servs., Inc.*, B-400134.11 *et al.*, Sept. 3, 2009, 2009 CPD ¶ 171 at 5.

Unequal access OCIs typically can be mitigated by preventing the individuals who have access to the nonpublic, competitively useful information from disclosing that information to individuals in the firm involved in a subsequent, related competition.

By "firewalling" such individuals from the competitive team for the subject procurement, a firm can neutralize any unfair competitive advantage gained through knowledge of the nonpublic information. *See Netstar-1 Gov't Consulting, Inc.*, B-404025.2, May 4, 2011, 2011 CPD ¶ 262 at 8 (finding that firewalling employees with access to historic labor rates from the pricing team mitigated potential unequal access OCI).

Alternatively, an unequal access OCI can be mitigated through the agency's release of the nonpublic, competitively useful information to all offerors, such that all offerors may compete on an equal basis. *See Dayton T. Brown, Inc.*, B-402256, Feb. 24, 2010, 2010 CPD ¶ 72 at 5-6 (finding no unequal access OCI where nonpublic, competitively useful information was distributed to all offerors).

Impaired objectivity OCIs

A contractor suffers from an impaired objectivity OCI where the contractor is tasked under one government contract with evaluating the work the contractor, or its affiliate or subcontractor, performs under a different government contract. FAR 9.505-3; *Aetna*, 95-2 CPD ¶ 129 at 12; *Alion Sci. & Tech. Corp.*, B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 at 7-8.

The primary concern for impaired objectivity OCIs is that the firm may not be able to impartially advise the government due to self-interest. *Aetna*, 95-2 CPD ¶ 129 at 12.

Unlike unequal access OCIs, impaired objectivity OCIs cannot be neutralized by firewalling individual employees alone. *Nortel Gov't Sols., Inc.*, B-299522.5 *et al.*, Dec. 30, 2008, 2009 CPD ¶ 10 at 7 ("while a firewall arrangement may resolve an 'unfair access to information' OCI, it is virtually irrelevant to an OCI involving potentially impaired objectivity.").

Rather, to mitigate an impaired objectivity OCI, contractors must pair firewalls with strategic subcontracting to eliminate any reasonable possibility of self-evaluation.

For example, contractors have effectively mitigated impaired objectivity OCIs by subcontracting the evaluation component of a contract to an independent third party, and then firewalling the subcontractor's employees from the contractor's employees. *See Alion Sci. & Tech. Corp.*, B-297022.4, Sept. 26, 2006, 2006 CPD ¶ 146 at 9-10 (agreeing with agency that awardee could mitigate impaired objectivity OCI by relying on firewalled subcontractors to perform potentially conflicting portions of contract requirements).

Additionally, contractors have had success neutralizing impaired objectivity OCIs by employing comprehensive mitigation plans bolstered by increased agency oversight. *See Overlook Sys. Techs., Inc.*, B-298099.4 *et al.*, Nov. 28, 2006, 2006 CPD ¶ 185 at 16-17 n.9 (finding that agency properly found minimal risk of OCI where awardee proposed to firewall certain employees, provide OCI training annually, and reassign tasks when impaired objectivity concerns arise, and agency committed to increased oversight over awardee's performance).

Biased ground rules OCIs

Biased ground rules OCIs arise where a firm establishes under one contract the ground rules (i.e., contract specifications or statement of work) for another government contract. FAR 9.505-1, -2; *Aetna*, 95-2 CPD ¶ 129 at 11; *L-3 Servs., Inc.*, 2009 CPD ¶ 171 at 5.

This type of OCI is problematic because the firm may establish ground rules that favor its own capabilities such that the subsequent competition is skewed in its favor. *Aetna*, 95-2 CPD ¶ 129 at 11.

Biased ground rules OCIs can be particularly challenging to mitigate because the conduct giving rise to the potential or actual OCI relates to the firm as a whole and often concerns the entirety of the subject procurement, rather than a segregable portion. Consequently, contractors typically cannot rely on firewalls or strategic subcontracting to mitigate such OCIs. *See Int'l Bus. Machs. Corp.*, B-410639 *et al.*, Jan. 15, 2015, 2015 CPD ¶ 41 at 9-10 (rejecting use of firewall to mitigate biased ground rules OCI).

This does not mean, however, that biased ground rules OCIs are necessarily incapable of mitigation. On the contrary, the FAR appears to acknowledge that biased ground rules OCIs can be mitigated under the right set of circumstances.

Specifically, FAR 9.505-2 provides that a contractor developing specifications or a statement of work for a particular procurement need not be excluded from competing for the ensuing contract where more than one contractor was involved in preparing the specifications or statement of work. FAR 9.505-2(b)(1).

This provision recognizes the reality that where more than one contractor is responsible for developing specifications or a statement of work, any one contractor likely would not able to skew the competition in its favor. *See id.*; FAR 9.505-1; *Aetna*, 95-2 CPD ¶ 129 at 11.

It also potentially opens the door for innovative mitigation plans, such as strategic subcontracting aimed at having an independent and firewalled subcontractor performing those portions of a contract for which the contractor developed specifications.

Waiver of OCIs

Although the FAR requires agencies to attempt to mitigate or neutralize potential or actual OCIs, it also authorizes agency heads, or their appropriate designees, to approve a waiver of an OCI where application of the OCI rules would not be in the government's interest. FAR 9.503.

In such circumstances, the FAR requires that the contracting officer submit a written request for waiver, setting forth the extent of the conflict, to the applicable agency head, or designee, for approval. *Id.*

Notably, the FAR does not provide any guidance regarding when, or under what circumstances, waiver may be in the government's interest, and the FAR does not require the agency to document its rationale for a waiver decision. *See id.*; *Turner Constr. Co. v. United States*, 94 Fed. Cl. 561, 584 (2010), *aff'd*, 645 F.3d 1377 (Fed. Cir. 2011) (noting that FAR 9.503's "discretionary language contains no hint of a requirement that an agency must waive or must document the reasons for a waiver decision").

Additionally, GAO has demonstrated an unwillingness to probe the issue, electing, instead, to defer to agencies without questioning whether a waiver is justified under the circumstances.

CHALLENGES TO OCI WAIVERS AT GAO

Challenging OCI waivers at GAO has proven to be a Herculean task for government contractors. In analyzing OCI waivers, GAO has largely considered only whether contracting agencies have checked all procedural boxes for obtaining a valid waiver — i.e., whether the request for waiver (1) was in writing, (2) stated the extent of the conflict, and (3) was approved by the appropriate agency official.

Where these prerequisites have been satisfied, GAO has dismissed challenges to an agency's OCI waiver without giving meaningful consideration to whether the waiver was warranted under the circumstances. *See AT&T Gov't Solutions, Inc.*, B-407720 *et al.*, Jan. 30, 2013, 2013 CPD ¶ 45 at 3-4 (dismissing OCI protest as academic after agency waiver of OCI); *SRA Int'l, Inc.*, B-407709.5 *et al.*, Dec. 3, 2013, 2013 CPD ¶ 281 at 6 (same); *see also Cigna Gov't Servs., LLC*, B-401068 *et al.*, Sep. 9, 2010, 2010 CPD ¶ 230 at 13-14 (denying OCI protest where agency waived OCI pursuant to FAR); *MCR Federal, LLC*, B-401954.2, Aug. 17, 2010, 2010 CPD ¶ 196 at 4-5 (same).

Recent developments suggest that OCI reform may finally be on its way.

An unequal access OCI can be mitigated through the agency's release of the nonpublic, competitively useful information to all offerors.

For example, in *AT&T*, the agency waived an OCI just three days before GAO's 100-day decision deadline, and only after GAO had advised the agency that it was likely to sustain the protest. 2013 CPD ¶ 45 at 3-4. The agency's waiver stated the following:

> 1. I exercise my authority under FAR 9.503 to waive any and all residual OCI concerns and potential impacts which are not completely eliminated or otherwise neutralized or mitigated by the circumstances described in the analysis developed in support of this waiver.
>
> 2. My conclusion that the waiver is appropriate is based upon:
>
> a. My access to the complete supporting contract file materials;
>
> b. My finding that the risk of any potential or real OCI existing under the subject contract is negligible to non-existent;
>
> c. My finding that the potential residual impact of OCI in this procurement is insignificant in comparison to the estimated annual savings ... and the substantive impact of disrupted support to the [Secret Internet Protocol Router Network]; and
>
> d. My finding that other performance strategies are not acceptable options for this requirement due to the limited market of qualified sources that would result and the loss of critical support services during the time needed to conduct a re-procurement.
>
> Id.

Based on this minimal and conclusory waiver justification, GAO determined that the agency had satisfied FAR 9.503's requirements for waiver. *Id.* Accordingly, GAO dismissed AT&T's protest as academic, without addressing any substantive arguments regarding why the agency's waiver may have been improper. *Id.*

Similarly, in *MCR Federal, LLC*, B-401954.2, Aug. 17, 2010, 2010 CPD ¶ 196 at 4-5, MCR challenged the agency's OCI waiver on three grounds: (1) the agency unreasonably considered MCR's OCI as equivalent to the awardee's OCI; (2) the agency's waiver was inconsistent with agency guidance; and (3) the waiver lacked a sufficient basis. *Id.*

In response, GAO simply stated that it had "considered all of MCR's assertions and [found] that none has merit." *Id.*

GAO then went on to discuss only the procedural prerequisites for an OCI waiver, finding that MCR had no basis to object to the waiver where the Source Selection Authority (1) made a written request for waiver, (2) the request detailed the extent of the conflict and why waiver was in the government's interest notwithstanding OCI concerns, and (3) the request was approved by an appropriately designated official. *Id.* GAO did not consider whether the agency's proposed rationale for waiver was actually reasonable. *Id.*; *see also The Analysis Group, LLC*, B-401726.3, Apr. 18, 2011, 2011 CPD ¶ 166 at 7.

Contractors have fared no better at the Court of Federal Claims. Although the Court has very limited OCI waiver case law, in *Turner Construction Co.*, the Court stated that contracting agencies are not required to document the reasons for a particular waiver decision. 94 Fed. Cl. 561, 584.

In so holding, the Court stripped contractors of a critical tool — a documented record — for challenging agency waiver determinations. *See id.* At no point did the Court explain how an agency's OCI waiver determination differed from other agency decisions that must be documented to survive review under the Administrative Procedure Act. *See id.*

And, at no point did the agency acknowledge that the lack of a record requirement afforded agencies unprecedented discretion in making official decisions. *See id.*

Thus, as evident from the above, the FAR imposes a minimal burden on contracting agencies considering waiving potential or actual OCIs. The FAR merely requires agencies to avoid OCIs unless it is in the "government's interest" not to do so, which creates an amorphous and difficult standard for assessing agency action.

The broad agency discretion to waive OCIs is especially troublesome given that certain OCIs, such as biased ground rules OCIs, are particularly difficult to mitigate, increasing the likelihood that an agency will exercise its waiver rights. But, while the status quo presents a challenging environment for protesters raising OCI allegations, there is reason to believe that meaningful OCI reform is on its way.

OCI REFORM AND THE PATH AHEAD

Approximately five years ago, DoD, GSA, and NASA issued a proposed rule to amend the FAR to provide revised guidance regarding OCIs. 76 Fed. Reg. 23,236. The proposed rule recognizes that the FAR's OCI coverage has largely remained unchanged since the initial publication of the FAR in 1984, and that "agencies do not always perform adequate, case-by-case, fact-specific analyses" when addressing OCIs. *Id.* at 23,237.

Moreover, with respect to waiver, the proposed rule provides that waiver should only be used "[i] n exceptional circumstances," and only if the agency head first determines that: (1) mitigation is not feasible; and (2) the waiver is "necessary" to accomplish the agency's mission. *Id.* at 23,246.

Further, the proposed rule would require any waiver to: (1) be in writing; (2) cover only one contract action; (3) describe the extent of the OCI; (4) explain why the waiver is necessary to accomplish the agency's mission; and (5) be approved by the appropriate official. *Id.*

Finally, the proposed rule would establish a requirement that contracting officers include this waiver documentation, along with the waiver decision, in the contract file. *Id.*

The above proposed rule would add much needed clarity regarding the proper use of OCI waivers, as it would move beyond FAR 9.503's limited procedural requirements for a valid waiver to, instead, prioritize substance over form.

It would also empower GAO to undertake a more substantial review of agency waiver decisions, including whether "exceptional circumstances" are present and whether waiver is "necessary" to accomplish the agency's mission. *See* 76 Fed. Reg. at 23,246.

Moreover, although the Court of Federal Claims has limited case law governing OCI waiver challenges, the proposed rule likely would make waiver challenges at the Court more plausible as well.

For example, the requirement that contracting officers include the waiver documentation and decision in the contracting file would create a record that the Court in *Turner* held was not required to be maintained. *See Turner*, 94 Fed. Cl. at 584. Consequently, the Court would actually have a record to review when considering whether an OCI waiver decision was arbitrary and capricious. *See id.*

Additionally, like GAO, the Court would be able to better assess whether a waiver was arbitrary and capricious by considering whether "exceptional circumstances" make waiver "necessary" to accomplish the agency's mission. *See* 76 Fed. Reg. at 23,246.

Although the proposed rule has languished in the review process for years, on June 16, 2016, DoD officially granted approval to publish a final OCI rule. Department of Defense, *Open FAR Cases as of 7/8/2016*, http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf.

A final rule is expected in September 2016. Office of Information and Regulatory Affairs, Office of Management and Budget, *Federal Acquisition Regulation (FAR); FAR Case 2011-001; Organizational Conflicts of Interest and Unequal Access to Information*, http://www.reginfo.gov/public/do/ ViewRule?pubId=201604&RIN=9000-AL82.

Thus, more than five years later, it appears that OCI reform is finally on its way. It remains to be seen, however, whether the final rule will live up to the potential of its predecessor to reel in agency discretion for OCI waiver determinations.

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