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ORGANIZATIONAL CONFLICTS OF INTEREST

RECENT DECISIONS

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I. Introduction

As discussed below, there has been a spate of recent protest decisions involving organizational conflicts of interests ("OCIs"), and the sustain rate has been remarkably high. Generally, the message to agencies is clear: If there is an OCI, you must either mitigate, neutralize, avoid, or waive. Otherwise the protest will be sustained. Where an agency does identify and properly address an OCI, that action is afforded strong deference.

II. Timeliness

In the past year, GAO has issued two decisions that have put offerors on notice that if they are aware of an OCI prior to the submission of proposals and notify the agency of that concern and the agency refuses to take action, then the offeror must challenge that decision prior to the submission of its proposal.

In *Honeywell Tech. Solutions, Inc.*, B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49, Honeywell informed NASA prior to submission of proposals regarding its concern that a competitor ("ITT") had an impermissible OCI because two senior ITT employees had access to confidential information pertaining to Honeywell and NASA that related to the procurement at issue. Prior to the deadline for proposal submissions, NASA responded to Honeywell's question regarding what had been done to ensure that ITT's access to Honeywell's methods of performing the predecessor contract had not created an unmitigated OCI. In its response, NASA explained in detail its determination that no OCI existed, and, therefore, ITT would not be precluded from competing. When Honeywell filed its post-award protest asserting this OCI contention, GAO dismissed as untimely, holding that Honeywell also knew that ITT was participating in the procurement and therefore Honeywell was required to file its protest prior to the closing time for receipt of proposals.

Similarly, in *Raydar & Assocs., Inc.*, B-401447, Sept. 1, 2009, 2009 CPD ¶ 180, Raydar filed a post award protest alleging that the awardee ("Tri Star") had an OCI, because (1) a Tri Star employee assisted in drafting portions of the RFP and (2) Tri Star "was directly involved in the collection of data to compile contract/solicitation estimates." GAO found these allegations untimely because the

record showed that Raydar knew that Tri Star was "likely to bid" and Raydar was aware of the Tri Star's employee's involvement with the preparation of the solicitation prior to the deadline for proposal submissions. Moreover, as with *Honeywell*, this concern was brought to the Government's attention prior to the submission of proposals. Specifically, Raydar e-mailed the agency, stating that it was "a bit uncomfortable" with Tri Star's involvement "in the casting of the new contract offerings," and the agency responded the same day that Tri Star's employee was only "data collecting" to help the agency compile contract estimates and would not have any role in source selection or have any influence on contract award. As a result, GAO dismissed the protest allegation as untimely, stating that Raydar should have protested prior to the closing time for receipt of proposals.

III. Government Changes Its Mind But Should Not Have

In *L-3 Servs., Inc.*, B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171, the Air Force retained SI to assist it with acquisition planning for a procurement for communications. Initially, the Air Force concluded that SI had an unmitigateable organizational conflict of interest and, therefore, could not compete for the resulting contract. However, the contracting officer subsequently changed his mind and permitted SI to compete, which it did as a subcontractor to General Dynamics Information Technology ("GDIT"). When the award was made to GDIT, L-3 protested. GAO concluded that the CO's decision to allow SI to compete was flawed because SI had a "biased ground rules" OCI. In this regard, GAO disagreed with the CO's rationalization that, because SI had not prepared the specifications, there was no "biased ground rules" OCI. GAO noted that the appropriate test was whether "whether a firm was in a position to affect the competition, intentionally or not, in favor of itself." Here, the company's acquisition planning activities had, in fact, had an impact on the procurement. Thus, SI was in a position to affect this competition in favor of itself.

Moreover, GAO also found that there was an "unequal access to information" OCI that had not been mitigated because the agency could not show that *all* of the competitively useful, confidential information to which SI had been exposed had been made available to the other offerors, and the firewall mitigation plan had apparently not been in place at the beginning of performance of the earlier work, nor had it been approved or agreed to by the agency. Finally, GAO noted that there is a presumption of prejudice to competing offerors when a non-*de minimis* OCI is not resolved and, specifically, that an unfair competitive advantage is presumed if an offeror possesses competitively useful non-public information that would assist that offeror in obtaining the contract without the need for any inquiry as to whether the information was in fact used.

IV. OCI Determination Entitled To Great Deference

In *Axiom Res. Mgmt., Inc. v. U.S.,* 564 F.3d 1374 (Fed. Cir. 2009), the U.S. Court of Appeals for the Federal Circuit set aside a Court of Federal Claims decision granting an unequal access to information OCI protest. The Federal Circuit found that the COFC applied the wrong standard of review, effectively examining the matter *de novo* instead of using the required "arbitrary and capricious" standard. The court emphasized that proper OCI and mitigation plan analyses are very fact intensive and, if performed by the agency (as had occurred in that case), are entitled to great deference on judicial review. On the merits, the Federal Circuit held that the analysis of the OCIs in future procurements that may arise from the awardee's access to information under the awarded contract need not be decided *a priori* but appropriately can be deferred until those future procurements are conducted.

V. Agency Failed To Recognize Impaired Objectivity OCI

The Analysis Group, LLC, B-401726, *et al.*, Nov. 13, 2009, 2009 CPD ¶237, involved a procurement for "a broad range of objective advisory and assistance services, technical analysis, and support in the area of counter-proliferation of weapons of mass destruction, specifically, combating chemical, biological, radiological and nuclear ("C-CBRN") weapons." However, the awardee, SAIC, also sold certain C-CBRN-related products and services. The agency reviewed the OCI information provided by SAIC and concluded that there was no OCI. GAO found that because SAIC would be in a position to provide the government information that might influence acquisition decisions, SAIC had an impaired objectivity OCI. Moreover, SAIC's proposal to continue to self-evaluate for OCIs could not be relied upon – the agency was required to perform an independent OCI evaluation and determination.

VI. Contractor Report Creates Biased Ground Rules OCI

In *Energy Sys. Group*, B-402324, Feb. 26, 2010, 2010 CPD ¶ 73, the protester challenged its exclusion from the procurement based on an alleged "biased ground rules" OCI. Here the Navy considered entering into a sole source energy cost savings contract with a utility where the utility finances the capital costs needed to generate the savings and then recovers those costs over time from the Navy's energy savings. In anticipation of this contract, the Navy awarded a task order to Virginia Natural Gas ("VNG") to prepare a feasibility study for this project. VNG subcontracted a portion of the work on the feasibility study to Energy Systems Group ("ESG"). After the feasibility study was completed, the Navy changed its mind and decided to use Recovery Act funds to pay for the capital cost and issued a competitive solicitation for a design build contract. However, because the

requirements of that solicitation were based on the feasibility study, the CO concluded that the protestor had a "biased ground rules" OCI and excluded it from the competition. GAO agreed that the exclusion was rational. First, it did not matter that, at the time the feasibility study was created, the protester and the agency were unaware that these requirements would be incorporated in a competitive solicitation because there is no foreseeability requirement to a biased ground rules OCI. Second, ESG's conduct was not excused because the report only provided recommendations that the Navy was free to accept or reject because it was undisputed that 80% of the solicitation requirements was based on the study. In addition, because ESG admitted that it assumed that it would be performing those requirements as part of the sole source contract and therefore was in a position to describe that work in a manner advantageous to itself. Finally, the OCI was not mitigated by the provision of the study to the offerors – it was the preparation of the study that created the OCI.

VII. Mergers And Acquisitions

B.L. Harbert-Brasfield & Gorrie, JV, B-402229, Feb. 16, 2010, 2010 CPD ¶ 69, and *McCarthy/Hunt, JV*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68, involved the same set of operative facts and the same procurement.

The awardee's subcontractor, Ellerbe Becket ("EB") was engaged in acquisition discussions with a third company, AECOM Technology Corporation ("AECOM") during the procurement. However, at the same time, a subsidiary of AECOM was assisting the government in preparing certain requirements and with its review of technical proposals in connection with the procurement at issue. AECOM ultimately concluded the transaction and acquired EB approximately a month after the contract was awarded.

The GAO found that, notwithstanding the fact the negotiations had been "intermittent" throughout the procurement, the "relationship between the firms was sufficiently close to give rise to an organizational conflict of interest." Specifically, GAO found an "unequal access to information" OCI because of AECOM insight into details regarding the procurement. Significantly, GAO found that the non-disclosure agreement executed by the parties in connection with the deal was insufficient to mitigate OCI because (1) unilateral mitigation efforts are inconsistent with the FAR and (2) the non-disclosure efforts were inadequate. Second, GAO also concluded that there was a "biased ground rules" OCI because of AECOM's role in drafting the specification. The fact that there was no evidence that AECOM attempted to skew the procurement to EB is irrelevant since, where an OCI is found, prejudice is finally. Finally, as to the "impaired objectivity" OCI, the agency showed that protester had not been adversely impacted in the evaluation

by the AECOM employees and therefore the protester was unable to demonstrate prejudice.

VIII. OCI Mitigation

In *First Coast Service Options, Inc.*, B-401429, July 31, 2009, 2010 CPD ¶ 6, the GAO denied a protest challenging the decision of Centers for Medicare and Medicaid Services ("CMS") rejecting the protester's proposed "firewalled subcontractor" mitigation plan and excluding protester from the procurement. The procurement was for "qualified independent contractors" ("QIC") to perform reviews of initial Medicare payment determinations made by the Medicare Administrative Contractor ("MAC") within a particular geographic area. The protester was also a MAC within that relevant region and therefore had an impaired objectivity OCI because it would be called upon as a QIC to review its work as a MAC. Originally the protestor proposed a firewall-type of arrangement where the QIC work and the MAC work would be separate lines of business and, after award, the MAC contract would be novated to a separate corporate entity. CMS rejected this approach because "both FCSO and [its sister corporation] are ultimately working for the same organization, [the common parent corporation], with an incentive to benefit [the parent corporation] overall." In response, at the last minute, the protester stated, without providing any detail, that it would use a firewalled subcontractor to perform the conflicted work. CMS rejected this approach because of the lack of detail. GAO denied the protest finding both of CMS's determinations to be rational.

Cahaba Safeguard Administrators, LLC, B-401842.2, January 25, 2010, 2010 CPD ¶ 39, involved the same agency and a similar contract. The contract at issue was a contract to support CMS audit, oversight and anti-fraud efforts to review performance by, *inter alia*, Medicare Part D contractors. Awardee's parent corporation held Medicare Part D contracts. Again the awardee's initial mitigation plan was rejected by agency. However, in the end, CMS accepted a last-minute, one sentence mitigation plan that said that if the awardee were given Part D task orders, then, at the awardee's parent's discretion, the awardee's parent would 1) divest the awardee, 2) terminate its own Part D contracts, or 3) subcontract out the Part D work that created the conflicts. In approving the mitigation plan, CMS only looked at divestiture option. GAO found acceptance of this mitigation plan unreasonable because there was no specific required mitigation action, the agency had to have analyzed and found all three option acceptable, but it did not. Moreover, the third option – subcontract out the Part D work that created a conflict – was clearly inadequate because awardee would be reviewing Part D work its parent had already performed.

IX. Conclusion

In sum, OCIs remain a hot topic. Agencies are afforded broad discretion if they recognize the OCI and exclude conflicted offerors. However, if agencies fail to recognize OCI or fail to resolve them, a protest will likely be sustained.