



GAO, Courts Give Agencies More Flexibility In OCI Rulings

By **Dietrich Knauth**

Law360, New York (April 10, 2012, 6:45 PM ET) -- Recent decisions by the U.S. Government Accountability Office and courts have allowed agencies more discretion in handling potential organizational conflicts of interests in procurements, backing away from a tradition of automatically recommending that companies be banned from contract competitions because of OCI concerns, attorneys said.

Under OCI regulations, companies can be barred from competing for government contracts when their relationships with other companies threaten to bias a procurement. Bid protest case law has traditionally been unforgiving of such conflicts of interest, but recent decisions have shifted the landscape and given contractors more of an opportunity to explain away or mitigate potential OCIs, according to attorneys.

"This is an area where the consequences can be exceedingly harsh for contractors and the rules have been pretty black-and-white and draconian for a long time," John Chierichella of Sheppard Mullin Richter & Hampton LLP said.

Observers point to two Federal Circuit decisions behind the GAO's reluctance to throw out companies based on OCIs — the 2009 decision in *Axiom Resource Mgmt. Inc. v. U.S.* and the 2011 ruling in *Turner Construction v. U.S.* In *Axiom*, the appeals court said that the agency's OCI decisions should be overturned only if they are arbitrary and capricious, and in *Turner*, the court said that OCI allegations must be based on "hard facts" and not suspicion and innuendo.

The two rulings have given agencies more flexibility, making the GAO less likely to overturn agency decisions on OCIs, according to Hogan Lovells partner Michael McGill.

"I think, given the Federal Circuit decisions, you're naturally going to see a lower rate of success for protests challenging an agency's decision not to exclude a competitor based on alleged organizational conflicts of interest," McGill said. "Even if there is a suggestion of a conflict, they are going to examine what the agency did under the arbitrary and capricious standard, and that's a pretty high standard."

In *Turner*, the GAO initially ruled that the U.S. Army Corps of Engineers erroneously concluded that Turner, the winning contractor for a \$333 million hospital construction contract, had no OCIs despite a rival's assertion that Turner was conflicted because of a merger between Aecom Technology Corp., the parent of the company that gave Turner technical assistance on the hospital design, and Ellerbe Becket, a Turner subcontractor that provided design coordination.

After that decision, the Corps held a new competition for the contract, following the GAO's recommendation to exclude Turner. When Turner protested that decision in the Court of Federal Claims, both it and later, the Federal Circuit, overturned the GAO decision and ruled that there were no hard facts to support the OCI claim, only suspicion and innuendo that an unnamed employee may have had access to information about the competition.

Attorneys for Turner's rivals said at the time that the decision represented a weakening of OCI law that "has opened the door to potential future abuses." But Chierichella and his Sheppard Mullin colleague Anne Bluth Perry said that the decision represents a step away from the GAO's bright-line rule, encouraging a more thorough analysis of facts underlying OCI allegations.

After Turner, the GAO published at least two decisions requiring hard facts as the basis for an OCI allegation, including *In re: VSE Corp.* in November and *In re: Raytheon Co.* in July, as potentially restricting OCI allegations based on "the appearance of impropriety," according to Chierichella.

In the VSE case, the GAO sustained a protest of a contract cancellation, ruling that the record did not support a contracting officer's determination that an appearance of impropriety had been created by the protester's hiring of a former government employee as a consultant.

While contractors should welcome the GAO's new willingness to engage with contractors and look at the facts behind alleged OCIs rather than using the appearance of impropriety to automatically disqualify contractors, stepping away from a bright-line rule does come with uncertainty, according to experts.

"It remains to be seen how the GAO is willing to go with this hard facts thing because if you take it to its logical limit, then the 'appearance of propriety' cases go away," Chierichella said. "The GAO isn't going that far in my view — it's going to evolve in fits and starts."

Kirk Manhardt, a U.S. Department of Justice attorney, said at a recent procurement conference that even if the GAO and Court of Federal Claims end up placing a heavier emphasis on hard facts, they won't permanently abandon the appearance of impropriety standard because it is written into the Federal Acquisition Regulation.

Perry and Brian E. Toland, deputy command counsel for the U.S. Army Materiel Command, said the recent decisions add more uncertainty to the acquisition process.

"There is a much harder road for agencies to follow when they think there's an OCI and they try to throw someone out for that," Perry said.

In response to the OCI decisions, Toland co-authored a guide for contracting officers to emphasize the need for rigorous and well-documented investigations of OCI claims. While contracting officers have discretion in evaluating OCIs, they should not expect that discretion to be honored if they give cursory or incomplete evaluations, Toland says.

"Evaluating OCIs is not a fill-in-the-blanks process," he said.

But a more rigorous analysis of facts doesn't always explain away OCI allegations. In another 2011 decision in *Netstar-1 Gov't Consulting, Inc. v. United States*, the Court of Federal Claims reversed the GAO, and unlike in Turner, came down harder on the contractor with the alleged OCI. The court found a contracting officer's proposed mitigation plan was insufficient because it relied on the conflicted contractor to sign nondisclosures and police itself.

"The process of identifying and mitigating a conflict is not a bureaucratic drill, in which form is elevated over substance, and reality is disregarded," Judge Francis Allegra held in *Netstar-1*. "Nor is it a check-the-box exercise, in which the end result — that the OCI is mitigated — is all but preordained."

Although the broad doctrines of OCI case law haven't changed much since the GAO laid out the three basic forms of OCIs – impaired objectivity, unfair access to nonpublic information and biased ground rules – in a landmark 1995 case, the OCI cases remain fertile ground for protests because they often apply those well-established doctrines to new and complicated factual scenarios, according to Peter Eyre, a counsel in Crowell & Moring LLP's government contracts practice. The Federal Circuit's recent decision in *Turner* adds some further uncertainty to the mix.

"OCIs remain a red hot area for protestors, and they tend to produce some very interesting protests," said Peter Eyre, a counsel with Crowell & Moring LLP's government contracts practice. "You tend to see decisions that have to delve into new factual situations its quite dynamic in the sense that these doctrines are being applied to new areas."

As an example of OCI case law possibly expanding to cover new situations, Eyre pointed to the GAO's February decision in a case brought by McTech Corp., which was excluded from competing for a construction contract based on the fact that it was a close business partner with the designer of the construction project. The ruling was significant because it was seemingly the first time the GAO recognized an OCI by treating a protégé as an affiliate, potentially an expansion of OCI rules that could carry over to other mentor-protégé relationships, Eyre said.

Because the current regulations on OCI are decades-old, contractors and agencies are often faced with uncertainty when making decisions based on case law, and that's less than ideal given the complicated factual nature of OCI analyses, McGill says.

"Because OCI issues tend to be fact specific and vary from procurement to procurement, they don't lend themselves easily to across the board, bright line rules." McGill said. "Little differences in facts can lead to different results."

New OCI regulations, which are under consideration by the Federal Acquisition Regulatory Council, could give agencies more clarity and guidance in making OCI evaluations, according to McGill.

The new rule, while still needing to be fleshed out before being finalized, includes much more detailed guidelines for mitigating OCI issues, such as using a corporate firewall or subcontractor to segregate a company's work on issues that could impair later procurements, or sharing information among contractors so that no one company has unfair access.

The rule also allows increased flexibility for the government to accept risks that only threaten the government's interest — such as the risk of receiving biased advice — rather than harming the competitive process.

--Editing by Pamela Wilkinson and Andrew Park.

Clarification: An earlier version of this article oversimplified the relationship between the GAO and contracting agencies, and the GAO and the Court of Federal Claims. The GAO issues non-binding advice and cannot directly "ban companies from contract competitions" or "overrule agency decisions," although its decisions are usually given great deference by agencies and the Court. Similarly, the Court of Federal Claims does not "overturn" GAO rulings, but it can issue binding decisions that are directly contrary to the GAO's advice. The writer also overstated Michael McGill's views on the new OCI regulations, saying that uncertainty could be "ironed out" by the new rule.

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