

28th Annual Ounce of Prevention Seminar

Welcome

Predicting the Future: Federal Contracting in an Election Year

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RECENT PROTEST DECISIONS ON ORGANIZATIONAL CONFLICTS OF INTEREST

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FAR DEFINITION OF ORGANIZATIONAL CONFLICT OF INTEREST (OCI)

- Far 2.101
 - An OCI occurs when, “because of other relationships or circumstances, a contractor may be unable, or potentially unable, to render impartial advice or assistance to the government, the contractor’s objectivity in performing the contract work is or might be impaired, and/or the contractor would have an unfair competitive advantage.”
- Three categories of OCI
 - Impaired Objectivity
 - Biased Ground Rules
 - Unequal Access to Information

Recent OCI Protest Decisions:

Attribution of OCIs to Non-Affiliated Entities

- McTech Corp., B-406100 et al., Feb. 8, 2012, 2012 CPD ¶ 97
 - McTech, a large business construction firm, and BrooAlexa, a small business construction firm, were partners in an Mentor-Protégé agreement under the SBA's 8a Mentor-Protégé Program
 - The agreement contained provisions calling on the parties to share and consult on all bid and proposal efforts
 - BrooAlexa served as the design contractor for the Army on a construction procurement
 - McTech submitted a bid under the same construction procurement
 - The Army found McTech to have an unequal access to information OCI as a result of BrooAlexa's inside knowledge
 - GAO upheld the Army's determination, finding that the Army reasonably attributed the information of the protégé to its mentor

Recent OCI Protest Decisions: Attribution of OCIs to Non-Affiliated Entities

- Implications of McTech Corp.:
 - First time GAO has definitively extended the notion of OCI attribution to entirely unaffiliated firms
 - “Affiliate rule” recognizes that knowledge of an affiliate can be attributed to its corporate affiliates
 - In 2010, GAO rejected extending this principle to companies with a “close relationship”. See *Valdez International Corporation*, B-402256.3, Dec. 29, 2010, 2011 CPD ¶ 13
 - Unclear if GAO’s extension in *McTech* was a course change away from *Valdez International*, or a one-time exception based on unique circumstances. GAO does not explain.
 - Contractors must be aware that the language of teaming agreements and joint venture agreements, as well as conduct of firms in those arrangements, could create a conduit for OCI attribution

Recent OCI Protest Decisions: Attribution of OCIs to Non-Affiliated Entities

- Secondary Procedural Implications of McTech Corp.:
 - Apart from substance, *McTech* evidences GAO's shifting view on "post hoc" agency submissions during the middle of litigation
 - Traditionally, GAO has been reluctant to accept *post hoc* rationalizations made in heat of litigation
 - In *Turner Const. Co., Inc. v. United States*, 94 Fed.Cl. 561 (2010) *aff'd* 645 F.3d 1377 (Fed. Cir. 2011), the Court held that post-protest OCI determinations were entitled to deference and must be considered in a protest analysis
 - It was an open question if and/or how GAO would adapt to Federal Circuit guidance
 - In *McTech*, GAO arguably went further than *Turner* by allowing the agency to defend its OCI analysis with evidence that it had not considered at the time it opted to disqualify the protester

Recent OCI Protest Decisions: No Conflicts Where Information Isn't Marked

- CACI, Inc.-Federal, B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 31
 - Protester-incumbent alleged that the awardee, in its capacity as an agency support contractor, had received confidential information from the protester while the protester was performing the incumbent contract
 - Alleged that this information created an unequal access to information OCI by affording the awardee insights into the protester's technical and pricing approach
 - GAO found that the information provided to the awardee was not marked proprietary/confidential and thus refused to consider then as such after the fact
 - Contractors must be mindful to protect their information so as to avoid future competitive harm. Mark all materials confidential because GAO will not undo contractor oversights

Recent OCI Protest Decisions: Conflicts Between State and Federal Interests

- Cognosante, LLC, B-405868, Jan. 5, 2012, 2012 CPD ¶ 87
 - In a CMS procurement for auditing services supporting the integrity of the Medicaid program, protester was excluded from the competition for an impaired objectivity OCI due to its dual role as a Medicaid auditor on the State level in North Dakota and on the federal level in the same area
 - Under the state program, protester was paid on a contingency basis for each incident of over-charging identified
 - Under Federal program, protester paid regardless but Government recovered for over-charging only if the fraud was found under the Government audit

Recent OCI Protest Decisions: Conflicts Between State and Federal Interests

- Cognosante, LLC, B-405868, Jan. 5, 2012, 2012 CPD ¶ 87
 - GAO concluded that CMS reasonably found this to be an OCI, because contractor would have incentive to report under the State contract incidents of fraud discovered during the Federal audit.

Recent OCI Protest Decisions: Timeliness of OCI Challenges

- CRAssociates, Inc. v. United States, 102 Fed.Cl. 698 (Dec. 23, 2011)
 - Army awarded contract in 2009
 - Protester challenged the award at GAO and lost
 - Protester then challenged award at COFC but failed to convince the Court that a preliminary injunction was necessary
 - Protester ultimately won COFC protest and corrective action was ordered
 - In letter to the Army at beginning of corrective action phase, protester identified concerns about an unequal access to information OCI arising from information gained by the awardee during its performance prior to the COFC decision
 - Requested amendment to the RFP to remedy these unfair advantages

Recent OCI Protest Decisions: Timeliness of OCI Challenges

- CRAssociates, Inc. v. United States, 102 Fed.Cl. 698 (Dec. 23, 2011)
 - Army declined to amend the RFP as protester had requested but did not respond directly to the request
 - Protester submitted new proposals as part of corrective action without filing a pre-award protest
 - After losing the re-competition to the same awardee, the protester challenged Army's failure to remedy the OCI
 - COFC found OCI argument to be waived under *Blue and Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007) because protester could have raised the issue pre-award and failed to do so

Recent OCI Protest Decisions: Timeliness of OCI Challenges

- Implications of CRAssociates, Inc. v. United States, 102 Fed.Cl. 698 (Dec. 23, 2011)
 - GAO rule holds that post-award OCI challenges are timely unless protester raises the specific OCI issue with the agency and agency advises the protester that it does not agree with the allegation. *See, e.g., Honeywell Tech. Solutions, Inc.*, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49
 - Unclear if COFC is articulating different rule, or if COFC rule is predicated on the fact that a different rule applies during corrective action
 - Contractors should be aware that there may be greater risk in sitting on an OCI concern than previously thought, particularly in corrective action context

Recent OCI Protest Decisions: Unreasonable OCI Evaluations

- Traditionally, GAO and the COFC have shown considerable deference to agency OCI investigations when the agency actually looks at the alleged OCI issue and reaches a final decision.
- In the last year, three significant protests have been won by the protester convincing GAO/COFC that the agency did not do enough.
- NetStar-1 Government Consulting, Inc. v. United States, 101 Fed.Cl. 511 (2011)
 - Agency determined an unequal access to information OCI existed and attempted to mitigate by implementing a firewall and by having NDAs executed long after key members of the proposal team had accessed the information
 - COFC determined that the mitigation approach was insufficient and unreasonable under the circumstances

Recent OCI Protest Decisions: Unreasonable OCI Evaluations

- Jacobs Technology Inc. v. United States, 100 Fed.Cl. 198 (2011)
 - After GAO determined that the agency had missed an OCI when it determined that no OCIs were possible, agency refused to re-review its OCI analysis for additional mistakes
 - COFC concluded that an agency could not blindly rely on prior flawed OCI determination when the determination proved faulty; must reconsider the OCI question before re-awarding
- PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 et al, Aug. 4, 2011, 2011 CPD ¶ 156
 - Protest sustained where agency did not sufficiently investigate whether former agency official had access to information