

“Waive” Goodbye to OCIs?

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For years, the Government Accountability Office (GAO) has indicated in decisions sustaining organizational conflict of interest (OCI) protests that agencies could simply follow the waiver provisions in FAR 9.503 rather than take corrective action. And for years, agencies have shied away from accepting GAO's invitation. Maybe that is about to change.

In *AT&T Government Solutions, Inc.*, B-407720, Jan. 30, 2013, GAO dismissed as academic AT&T's protest alleging that the awardee of a Marine Corps task order should be determined ineligible because of an alleged OCI. GAO ruled that the protest had been rendered academic when the Marine Corps advised GAO that the head of the contracting activity (HCA) had properly followed FAR 9.503's waiver procedures. The waiver came on day 97 of the protest—three days prior to GAO's 100-day decision deadline. It followed the GAO attorney's indication, during outcome prediction, that GAO would likely sustain the protest because, “despite the Marine Corps' investigation, the record showed that the agency failed to meaningfully consider whether [the awardee] had unequal access to information and impaired objectivity OCIs.” Following receipt of the waiver from the Marine Corps, GAO promptly dismissed the protest noting that “[t]he issues in dispute in this case arise from the rules and procedures in Subpart 9.5, and, as of January 28, 2013, the application of these rules and procedures have been waived for this procurement by the Marine Corps, which renders the protest academic.” The Marine Corps HCA's view was that there was no real OCI to worry about: “My finding [is] that the risk of any potential or real OCI existing under the subject contract is **negligible to non-existent.**”

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What makes this decision interesting is not just GAO's interpretation of its protest jurisdiction, but the aggressive stance taken by the Agency in response to GAO's outcome prediction. When the Marine Corps learned that GAO had deemed its OCI analysis inadequate, it did not just roll over and decide to take corrective action. Instead, it opted to exercise its right under the FAR to waive an OCI in a situation where it had already determined to its satisfaction that no significant OCI existed. Only time will tell if other agencies will be inspired to respond to what they view as non-meritorious OCI allegations by issuing similar waivers and enabling the procurement at issue to proceed.