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NEWSLETTER

Do We Still Need OCI Reform?

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Four years ago the FAR Council solicited comments on significant proposed changes to the regulatory framework for organizational conflicts of interest (OCIs) that would develop new OCI guidance intended to be "clearer, easier to implement, and better suited to protecting the interests of the Government." *See* 76 Fed. Reg. 23236 (Apr. 26, 2011) (FAR Case 2011-001). The proposed rule came on the heels of a two-year period in which GAO sustained seven bid protests on OCI grounds-a stunning tally that compelled the FAR Council to express concern "that when addressing OCIs, agencies do not always perform adequate, case-by-case, fact specific analysis." The proposed FAR revision, though never withdrawn, has languished without being finalized or revised for further industry comment.

Since then, industry shifts-some obvious, others more subtle-have coalesced into a much different OCI landscape, and many of the bid protest risks that led to the proposed regulatory revision have dissipated:

- **The Federal Circuit's decision in *Turner Construction* reinforced the contracting officer's discretion to make business judgments as to whether a potential OCI is "significant" enough to warrant action.** FAR Subpart 9.5 delegates significant judgment to the contracting officer to make business decisions about the significance of an actual or potential OCI, and requires a contracting officer to take remedial action to avoid, neutralize, or mitigate only "significant" conflicts. In *Turner Construction Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011), the Federal Circuit highlighted this discretion, noting that "[t]he contracting officer has ***considerable discretion in determining whether a conflict is significant . . . .*** A significant potential conflict is

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one which provides the bidding party ***a substantial and unfair competitive advantage during the procurement process*** on information or data not necessarily available to other bidders . . . . The FAR therefore requires mitigation of 'significant potential conflicts,' but does not require mitigation of other types of conflicts, such as apparent or potential non-significant conflicts." After *Turner*, contracting officers seem more willing to engage in the type of sophisticated and nuanced business analysis that some potential conflicts demand. GAO has likewise given more deference to contracting officers' business judgments, in keeping with the *Turner* court's admonition that the contracting officer "enjoys great latitude in handling OCIs" and that GAO should "apply the proper deference in conducting its review" and not substitute its judgment for that of the contracting officer.

- **Agencies have embraced the authority to waive OCIs.** Agencies have shown more willingness and flexibility to consider whether the Government's "best interests" justify waiving an OCI under FAR 9.503. Whereas waiver used to be a tool used infrequently, if at all, in recent years there have been several reported cases in which OCI waivers have been granted, including at least two cases in which a waiver was granted *after* a bid protest was filed challenging an awardee's potential OCI.
- **More prevalent use of OCI-specific contract terms and conditions.** Anecdotally, it appears that agencies are making a more concerted effort to identify potential OCI scenarios at the outset of a procurement and to tailor contract clauses that more clearly restrict the work a contractor may perform in the future. In this manner, agencies stake out what they believe the future work restrictions may be (often to avoid future impaired objectivity or biased-ground rules type OCIs), which enables both the Government and contractors to move forward with a common understanding of where the boundaries of a potential OCI may lie.
- **Industry consolidation has been offset by spinoffs of SETA contractors.** For its part, industry responded to the heightening OCI environment in 2009-2010 with a spate of corporate spin-offs that mitigated the market-limiting impact of OCIs, especially in work involving SETA contractors performing technical assistance and advisory services. Some of the most notable divestitures included leading government contractors such as SAIC (Leidos), L-3 (Engility), Northrop Grumman (TASC), and Lockheed Martin (The SI Organization), to name but a few.

The collective impact of these trends has corresponded with a sharp downward trend in sustained bid protests involving OCIs. In the last three years, there have been only two GAO decisions sustaining a protest on OCI grounds, and each case involved "unequal access to information" situations caused by former government employees-a scenario that GAO treats under the "OCI" framework, but FAR Subpart 9.5 does not explicitly address.

Only four short years after the FAR Council proposed to revise the OCI regulations to counter a rise of bid protest litigation risks, it thus appears that the tide has turned and contracting officers no longer need sweeping regulatory revisions that would make the FAR's OCI guidance "clearer" or "easier to implement." There may, however, still be areas in which modest reform could be implemented to achieve other goals of OCI regulatory reform, such as identifying areas in which the regulations could be "better suited to protecting the interests of the Government." Two noteworthy areas include:

- **Government discretion to accept the business risk of a contractor's impaired judgment:** In cases where an OCI calls into question a contractor's independent judgment and ability to provide unbiased support to the Government, the proposed rule would permit the contracting officer to weigh the business risk of potential bias but continue to do business with the contractor. This business-minded approach would provide greater flexibility for managing OCIs.
- **Greater flexibility to mitigate OCIs involving bias and affiliates:** Although there is fairly clear guidance on how to mitigate OCIs involving "unequal access to information," existing caselaw provides relatively few options for mitigating other conflicts involving potential bias or impaired objectivity between affiliated entities. The proposed rule would recognize tools to mitigate these conflicts, including organizational and informational barriers and/or the use of a conflict-free subcontractor to perform the work.

Both of these modest additions to the current OCI framework would enhance the Government's ability to flexibly manage OCIs, while leaving in place the current framework that affords the Government (and industry) necessary flexibility to address unique OCI business challenges.