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Year-end OCI roundup: Significant OCI cases and what to expect from new FAR OCI rules

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In 2024, federal agencies and contractors continued to encounter diverse and complex organizational conflict of interest (OCI) issues in federal procurements. This article examines seven significant OCI cases from last year, shedding light on the implications of court rulings and Government Accountability Office (GAO) decisions.

These cases underscore the complexities of OCIs, OCI mitigation strategies, and the potential impact of these issues on federal procurements. This article concludes by previewing upcoming changes to the FAR that could signal a shift in how agencies and contractors will navigate OCI issues in the future.

Key OCI cases from 2024

***Deloitte Consulting, LLP*, B-422094, B-422094.2, Jan. 18, 2024, 2024 CPD ¶ 36:** GAO sustained a protest by Deloitte Consulting, LLP (Deloitte) concerning a $225 million U.S. Department of Homeland Security (DHS) award to upgrade DHS's financial management systems. Deloitte and the awardee, CGI Federal, Inc. (CGI), were the only two bidders for the order under the DHS Enterprise Financial System Integrator blanket purchase agreement.

After proposal submission but prior to award, DHS raised with CGI a potential OCI arising from a proposed subcontractor's work on a Cybersecurity and Infrastructure Security Agency (CISA) contract. CGI elected to eliminate the proposed teaming partner from its bid in an effort to mitigate the potential OCI.

Deloitte protested, arguing both that the exchange represented unequal discussions and that the agency unreasonably evaluated CGI's technical proposal by failing to consider the impact of CGI's mitigation strategy.

In sustaining Deloitte's protest, GAO rejected Deloitte's unequal discussions argument, finding that Deloitte had not been competitively prejudiced by the exchange.

However, GAO agreed that the agency did not adequately consider how the elimination of CGI's subcontractor affected the ultimate strengths of CGI's proposal. According to GAO, the teaming partner brought "unique experience and expertise relevant to performance of the contract," and therefore the agency's failure to consider the impact of the partner's elimination was unreasonable.

The ruling highlights potential risks of late-stage OCI mitigation efforts and the evaluation challenges they can pose for agencies.

***Dist. Commc'ns Grp., LLC v. United States*, 169 Fed. Cl. 538 (2024):** In *District Communications Group*¸ the U.S. Court of Federal Claims ruled that the U.S. Department of Veterans Affairs (VA) unreasonably disqualified bidder CruxDCG LLC (CruxDCG) from a suicide-prevention-services contract due to a perceived impaired objectivity OCI.

The VA disqualified CruxDCG, a joint venture between Crux Firm LLC and District Communications Group (DCG), based on DCG's participation in a related task order as a subcontractor. Under the related order, DCG helped provide advice and recommendations to the VA on the effectiveness of its suicide prevention outreach efforts.

GAO's Deloitte *ruling highlights potential risks of late-stage OCI mitigation efforts and the evaluation challenges they can pose for agencies.*

In response to the VA's notice of exclusion, DCG and CruxDCG filed an initial GAO protest in 2023 (https://bit.ly/3PrG2gT). They argued that there was no potential OCI because the two projects were "distinct and completely separate," and that the "scope and scale" of each were dissimilar.

GAO denied the protest, finding nothing unreasonable in the agency's decision to exclude CruxDCG from the competition based on a potential impaired objectivity OCI arising from DCG's existing advisory work.

The Court of Federal Claims came to the opposite conclusion, noting that the existing VA task order included a mitigation clause which addressed potential conflicts during and after contract performance. The clause specifically restricted DCG (or the prime contractor on the existing task order) from supplying any of the services it recommended to the VA.

The court observed that, given the clause, there was "no obvious incentive" for DCG "to recommend its own services because it would be prohibited from providing them." The court concluded that the VA failed to justify how the alleged conflicts affected the bidding process.

***Point Blank Enterprises, Inc. v. United States*, 168 Fed. Cl. 676 (2023) (order dismissing case as moot):** In *Point Blank Enterprises*, the Court of Federal Claims dismissed as moot a protest concerning a $14.5 million contract awarded by U.S. Immigration and Customs Enforcement (ICE) for body armor.

Point Blank Enterprises, Inc. (Point Blank) alleged that the awardee's ongoing contractual relationship with the FBI granted it unequal access to information and put Point Blank at a competitive disadvantage. Point Blank also alleged that the awardee "played a role in developing the exact technical specifications" that ICE incorporated into its requirements.

Ultimately, after more than a year of litigation, ICE acknowledged the potential OCI but concluded that it could not be avoided, neutralized, or mitigated. The case ended after ICE executed a waiver and determined that the risks of not having adequate body armor outweighed the harm caused by proceeding with the award.

In A Square Group, GAO concluded that CMS's OCI analysis relied on an "unreasonable understanding" of the awardee's proposed firewall.

***A Square Group, LLC*, B-421792.2, B-421792.3, June 13, 2024, 2024 CPD ¶ 139:** In *A Square Group*, GAO sustained a protest related to a $30.65 million task order awarded by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) for health insurance marketplace and financial management operational analytics.

The protest concerned the participation of one of the awardee's subcontractors in an earlier, related contract with CMS. Under the new task order, the awardee (and its subcontractor) might be responsible for validating payment and enrollment data that the subcontractor generated for CMS under the related contract.

During evaluations, the agency identified the potential for an impaired objectivity OCI, and requested that the awardee articulate a plan for avoiding a conflict. In response to these concerns, the awardee stated that it would implement a firewall to separate subcontractor personnel from all payment data and validation tasks under the new task order.

A Square Group (ASG) argued that CMS failed to meaningfully examine this potential impaired objectivity OCI or the implications of the awardee's proposed mitigation strategy.

GAO agreed, concluding that CMS's OCI analysis relied on an "unreasonable understanding" of the awardee's proposed firewall. Further, GAO found that the agency failed to document analysis of whether the proposed mitigation plan was compatible with the technical aspects of the awardee's proposal. As GAO put it, "there is no documentation in the record ... showing that the agency considered the impact of [awardee]'s mitigation strategy on [awardee]'s actual technical approach."

***Mayvin, INC v. United States*, No. 1:23CV02128 (Fed. Cl. filed Dec. 15, 2023):** In 2023, the Army awarded the PEO STRI Systems Engineering and Technical Assistance III contract to Advanced Technology Leaders Inc. (ATL).

However, three bidders — Will Technology, StraCon Services Group, and Mayvin, Inc. (Mayvin) — protested, citing an alleged OCI involving ATL's subcontractor, Seneca Global Services (Seneca), which held other contracts with PEO STRI. The Army investigated, determined a potential conflict existed, and rescinded ATL's award with the intention to reconduct the competition.

When the Army announced its intention to allow ATL to compete again without Seneca as a partner, Mayvin filed another protest, arguing this decision was improper. In July of 2024, the Army decided to cancel the solicitation and reject all proposals, including ATL's.

In October, Mayvin filed an amended complaint, arguing that this cancellation raised additional legal issues. Subsequently, StraCon filed its own protest challenging the Army's decision to cancel the solicitation, and the legal proceedings continue.

WSP USA, Inc., B-422725, Oct. 15, 2024, 2024 CPD ¶ 247: GAO found reasonable the U.S. Defense Logistics Agency's (DLA) decision to exclude WSP USA, Inc. (WSP) from participation in a procurement for the rapid deployment of emergency generators. DLA anticipated the award of at least three fixed-price, Indefinite Delivery, Indefinite Quantity (IDIQ) contracts.

The Act requires the FAR Council to supplement and update the regulatory definitions related to specific types of OCIs, including unequal access to information, impaired objectivity, and biased ground rules.

The awardees would then compete for generator delivery orders in support of Federal Emergency Management Agency (FEMA) disaster relief operations. WSP's proposal disclosed that WSP was already providing logistical support to temporary emergency power missions for the U.S. Army Corps of Engineers (Corps) and FEMA under the Corps' Advanced Contract Initiative (ACI).

DLA subsequently determined that WSP's role as an ACI contractor resulted in actual or potential OCIs related to unequal access to information and impaired objectivity, and excluded WSP from the competition.

WSP protested, but GAO found the agency's determinations reasonable and supported by the agency report. As an ACI contractor, WSP might obtain prior knowledge of potential generator lease requirements that would lead to a competitive advantage in a time-sensitive delivery order competition.

Additionally, the agency explained that WSP's work under the ACI contract would "provide WSP with the opportunity and the financial incentive to skew its assessment of the generators it provides and of the generators provided by its competitors." GAO found nothing unreasonable about these conclusions and denied WSP's protest.

***ITellect, LLC v. United States*, 173 Fed. Cl. 550 (2024):** ITellect, LLC, (ITellect) protested a Defense Information Systems Agency (DISA) Enterprise Voice Services (EVS) award to LightGrid, LLC, (LightGrid) after learning that LightGrid's president was married to a DISA contracting officer who briefly served as a contracting officer on ITellect's incumbent contract.

LightGrid did not disclose this relationship in its proposal, and ITellect argued both that FAR rules required DISA to disqualify LightGrid for making a material misrepresentation and that the relationship represented a potential or actual conflict of interest related to unequal access to information.

After receiving notice of the protest, DISA investigated ITellect's claims and concluded that the omission was immaterial and the alleged appearance of an OCI was not disqualifying.

The Court of Federal Claims found DISA's investigation and conclusions reasonable and denied ITellect's protest. According to the court, there was no material misrepresentation under these circumstances because DISA did not rely upon LightGrid's omission, and because the agency was already aware of the relationship between LightGrid's president and the DISA contracting officer based on the latter's annual ethics disclosures.

Further, according to the court, there was "[n]o evidence in the record" that "even suggests that LightGrid's president's wife either provided any confidential information to, or communicated with, her husband regarding the solicitation or the incumbent contract."

Anticipated FAR OCI rule changes

In December 2022, Congress passed Public Law 117-324, (https://bit.ly/3E1dPuA) the Preventing Organizational Conflicts of Interest in Federal Acquisition Act. The FAR Council has developed a FAR case (2023-006, https://bit.ly/3BS40Pf) to implement the new law in FAR Part 9.

Among other things, the statute requires the FAR Council to supplement and update the regulatory definitions related to specific types of OCIs, including unequal access to information, impaired objectivity, and biased ground rules.

The FAR Council is also expected to provide significant updates to the procedures at FAR 9.506. In particular, the statute requires the updated provision to "permit contracting officers to take into consideration professional standards and procedures to prevent organizational conflicts of interest to which an offeror or contractor is subject."

Once the FAR updates are complete, paragraph (a)(4) of the Act directs executive agencies to establish their own OCI procedures to address any agency-specific conflict of interest issues.

Notably, several executive agencies already have internal policies or formal provisions in their FAR supplements that cover OCIs (e.g., NASA [https://bit.ly/4gSFZH6], USAID [https://bit.ly/42eRTpU], NRC [https://bit.ly/40vvJh1]). Those agencies may end up needing to update their OCI rules and procedures to conform to the new FAR rules.

Conclusion

The developments in 2024 reflect the continuing significance of OCIs in federal procurement. Legal decisions from courts and GAO have provided additional guidance on the interpretation and handling of OCIs.

And while the FAR Council's ongoing rulemaking efforts may introduce significant regulatory updates, contractors and agencies alike will continue to encounter complex OCI issues that require careful planning and thoughtful mitigation or avoidance strategies.

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