Organizational Conflicts of Interest (OCIs):

Read FAR Subpart 9.5 at Your Own Peril!

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A major purpose of the Uniform Commercial Code is to promote certainty and predictability in commercial transactions, just as a major purpose of the *Federal Acquisition Regulation* (*FAR*) is to promote certainty and predictability in U.S. federal government contracting.

However, one area where the *FAR* falls woefully short of providing certainty and predictability is Subpart 9.5, which addresses "Organizational Conflicts of Interest" (OCIs). As discussed in this article, the *FAR*'s definition of an OCI is, in many cases, inaccurate and confusing, and utilizes conclusory standards with little practical guidance for both government contractors and contracting officers alike.

OCIS DEFINED

What the *FAR* Says

The *FAR* defines an *organizational conflict of interest* as follows:

> "Organizational conflict of interest" means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Unfortunately, this broad definition provides little useful guidance regarding the *types* of specific activities or relationships that might give rise to an OCI.

What GAO Says

Fortunately, the Government Accountability Office (GAO) has evolved much of the practical guidance on this topic. According to GAO, OCIs typically fall into one of the following three categories.

- Unequal access to information–where a contractor has access to nonpublic information that would provide an unfair competitive advantage.
- Biased ground rules–where a contractor, as part of its performance of a another government contract, has set "ground rules" that would give it an unfair competitive advantage for future contracts.
- Impaired objectivity–where a firm's work under one contract could entail its review or evaluation of itself under another contract.

THE "UNFAIR COMPETITIVE ADVANTAGE" CRITERIA MISSES THE MARK

Of the three OCI categories identified by GAO, at least two of them (i.e., "unequal access to information" and "biased ground rules") depend upon whether or not a particular activity affords the contractor an "unfair competitive advantage." Accordingly, when evaluating OCIs, one source of great difficulty arises when attempting to define what constitutes an "unfair competitive advantage." Insightfully, the Court of Federal Claims has described the "unfair competitive advantage" criteria as "nettlesome to apply, particularly in cases where the awardee has performed on related contracts."

Adding to the confusing nature of the term *unfair competitive advantage* is the difficulty of fitting it within a traditional conflict of interest framework:

> While one could say that every company has an obligation to compete without unfair advantages, calling this an OCI seems like a semantic stretch. Having an unfair competitive advantage, notably, is not related to the biased judgment that is otherwise the hallmark of a conflict of interest. Even in the situation where an unequal access to information case sounds most like an OCI–where a firm has access to nonpublic information due to its work under a period contract and that information may help the firm in competing for a future contract–the situation would be just as troubling if the firm had never held a prior government contract, but had instead gained access to the nonpublic information by, for example, receiving it through an inadvertent disclosure by the government, or by hacking into the government's computer files or bribing a government official–or, for that matter, through industrial espionage. The problem in those cases is that the competition is tainted, not that the taint arose due to a firm's prior contract. That is not to say that unfair competitive advantages are good–but it may be confusing and inappropriate to say that they create an organizational (or any other kind of) conflict of interest.

HOW UNFAIR IS "UNFAIR"?

Problematically, the *FAR*'s adjective "unfair" is a mere conclusion without any meaningful guidance. "Fairness," much like beauty, is in the eye of the beholder. For example, while a position of incumbency undoubtedly carries significant competitive advantages, mere incumbency itself is not considered to be an "unfair" competitive advantage.

In an attempt to shed light on what constitutes an "unfair" competitive advantage, the *FAR* provides two examples where a "significant" competitive advantage could be interpreted to exist, but where no OCI will be found:

> Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment….
>
> XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.

In these examples, the *FAR* seemingly acknowledges the existence of a competitive advantage, but does not conclude that the advantage is "unfair," such that it rises to the level of an OCI. Instead, the *FAR* appears to conclude that these potential advantages are either unavoidable, or perhaps even beneficial to the government. For its part, the *Defense FAR Supplement* (*DFARS*) expressly *encourages* defense contractors to engage in research and development activities that could pose a competitive advantage in future procurements.

Attempting to predict when a competitive advantage becomes an "unfair" competitive advantage can be a perplexing task. To illustrate, GAO has upheld a finding of an OCI in a situation that is remarkably similar to the first of the two *FAR* examples, where the *FAR* otherwise suggests no OCI should be found. In *Lucent Technology World Services*, the contracting officer concluded that Lucent had an OCI arising from its preparation of the technical specifications in the solicitation. Notwithstanding the *FAR* example, GAO upheld the

contracting officer's decision to exclude Lucent's proposal. In reaching that decision, GAO noted that the contracting officer had broad discretion to avoid even the "appearance" of an unfair competitive advantage that might compromise the integrity of the procurement process.

THE APPEARANCE OF "APPEARANCE"

Contributing to the perplexity of defining an "unfair" competitive advantage, the decision in *Lucent* indicates that, not only will an OCI disqualify a contractor if it is *actually* unfair (with "unfair" being difficult enough to define), but also when it merely *appears* unfair.

The *FAR* supports this approach by defining an OCI as something that renders a contractor "unable or *potentially* unable to render impartial assistance...." As a result, government contractors are placed in the situation of having to surmise not only whether they *actually* have a competitive advantage that is "unfair," but also whether they may be *perceived* as having such an advantage. This is particularly problematic in an environment of vigorous competition, where even a minimal advantage to one contactor is likely to be asserted as "unfair" by potential competitors.

Ironically, if the "unfair competitive advantage" criteria were to be taken to the extreme, it would run contrary to the intended purpose of the federal acquisition process of meeting the government's requirements in terms of "cost, quality, and timeliness" by disqualifying firms advantageously situated to provide the goods or services.

HOW SIGNIFICANT IS "SIGNIFICANT"?

The *FAR* tasks contracting officers to "[a]void, neutralize, or mitigate *significant* potential conflicts before contract award." According to GAO:

> The *FAR* recognizes that conflicts may arise in factual situations not expressly described in the relevant *FAR* sections, and advises contracting officers to examine each situation individually and to exercise common sense, good judgment, and sound discretion in assessing whether a *significant* potential conflict exists and in developing an appropriate way to resolve it.

In some situations, a potential OCI may at first glance seem insignificant, but may later be found to be "significant." To illustrate, compare the sagas of two different protesters involved in federal litigation: *QualMed, Inc.* and *Turner Construction Co.*

In *QualMed*, the contractor's teaming partner had acquired a company that was a support contractor for the procuring agency. The acquired company had participated in the evaluation of proposals. The contractor brought the potential OCI to the attention of the agency and submitted a mitigation plan that involved implementation of a "Chinese Wall." Although

the mitigation plan was approved by the contracting officer, GAO subsequently found that the plan was inadequate to address the OCI and recommended that the contractor be disqualified from award. That decision was affirmed by a U.S. District Court.

Turner Construction involved a U.S. Army contract to build a new hospital at Fort Benning. In a complex web of connectivity, the parent company of one of the companies that designed the hospital was performing due diligence to acquire one of the subcontractors proposed to build the hospital. The potential OCI was brought to the attention of the contracting officer, who did not regard it as "significant." In a subsequent protest decision, GAO found that a "biased ground rule" OCI existed, as well as an "unequal access to information" OCI. However, GAO was overturned by the Court of Federal Claims on grounds that GAO had irrationally disregarded and improperly substituted its own judgment for the findings of the contracting officer.

In *QualMed*, the contracting officer's finding that the OCI was not "significant" was reversed by GAO; the reversal was then upheld by the federal court. In contrast, in *Turner Construction*, the contracting officer's determination that an OCI was not "significant" was upheld based on deference given by the court to the contracting officer's judgment. Thus, the unpredictability as to the amount of deference a court will give to a contracting officer's determination of an OCI's significance can be a problem to parties who want to avoid the disruption of a successful protest.

MITIGATING "MITIGATION"

As previously stated, the *FAR* tasks contracting officers to "[a]void, neutralize, or mitigate significant potential conflicts before contract award." However, the only guidance in the *FAR* on "mitigating" an OCI is provided at FAR 9.508(h):

> Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field to make proprietary information available to Company A. The contract must require Company A to…[e]nter into agreement with these firms to protect any proprietary information they provide[,] and…[r]efrain from using the information in supply lasers to the government or for any purpose other than that for which it was intended.

As per the *FAR*, this situation describes an "unequal access to information" OCI. Following this guidance, an agreement by a contractor to limit its use of information may be sufficient to mitigate an OCI arising from such unequal access. Thus, GAO has observed:

> Where a prospective contractor faces a potential unequal access to information organizational conflict of interest, the conflict may be mitigated through the implementation of an effective mitigation plan.

The timing of a contractor's mitigation effort is crucial. After-the-fact mitigation efforts are more likely to be unsuccessful. In *VRC, Inc.*, a contractor protested the U.S. Army's decision to disqualify it from a procurement. The basis was that an individual employed by a company with ownership ties to the protester was assigned to work in the agency's contracting office, thus giving rise to a potential "unequal access to information" OCI. VRC asserted that it had implemented "firewall arrangements" that the contracting officer should have found sufficient to mitigate any OCI. The contracting officer found that, had the OCI issue been raised earlier in the procurement process, it might have been possible to mitigate it. However, because the conflict was not raised until two days *after* the proposals were submitted, the contracting officer saw no way to mitigate the conflict and instead decided to avoid the conflict altogether by rejecting the proposal. The contracting officer's decision was upheld by GAO.

While it is fairly clear that "unequal access to information" OCIs can be mitigated by way of an effective mitigation plan, the question arises whether "impaired objectivity" or "biased ground rules" OCIs can be similarly mitigated. In *Nortel Government Solutions*, GAO held that a firewall did not avoid, mitigate, or neutralize an "impaired objectivity" OCI resulting from a contractor's performance of dual roles reviewing and providing input on its own designs.

Similarly, in *L-3 Services, Inc.*, GAO sustained a protest where the contractor had a

"biased ground rules" OCI. GAO found that the contractor's unsupervised and "self-executing" mitigation plan was inadequate to address the OCI. The decision states: "

> With respect to the biased ground rules organizational conflict of interest, the ordinary remedy where the conflict has not been mitigated is the elimination of that competitor from the competition.

While GAO's decision referenced the *possibility* of mitigation, it provided no guidance on what steps the contractor could have taken to effectively mitigate the "biased ground rules" OCI.

HOW HARD IS A "HARD FACT"?

GAO has made clear that a protester must identify "hard facts" indicating the existence or potential existence of a conflict and that mere inference or suspicion of an actual or potential conflict is not enough. Meanwhile, the *FAR* itself provides conflicting guidance. FAR Subpart 9.5 makes no mention of "hard facts"; instead, FAR 3.101-1 states:

> The general rule is to avoid strictly any conflict of interest or even the *appearance* of a conflict of interest in government-contractor relationships.

The result is that if a losing offeror seeks to protest on grounds of a perceived OCI, the protester will be held to a high standard, requiring "hard facts" to sustain the protest. Meanwhile, if the government decides to exclude a protester on grounds of a *perceived* OCI, the government may do so based upon even the mere "appearance" of a conflict.

WHEN TO FAVOR A "WAIVER"?

In addressing OCIs, the *FAR* instructs that the government should consider "two underlying principles":

- Preventing the existence of conflicting roles that might bias a contractor's judgment, and
- Preventing unfair competitive advantage.

As an exception to the OCI rules, the *FAR* allows an agency to "waive" an OCI based upon "government interest":

> The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in *the government's interest*. Any request for waiver…requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

Where a contracting officer cannot avoid, neutralize, or mitigate a significant conflict of interest before award, but award to the apparent winner is in the best interest of the government, the agency can process a "waiver" under FAR 9.503. The waiver must be approved by the agency head or designee.

Unfortunately, the *FAR* provides no guidance on when it "would not be in the government's interest" to prevent bias or unfair competitive advantage. The "waiver" provision ostensibly allows the agency to determine that the government's interest in obtaining a particular benefit outweighs the government's interest in avoiding an OCI.

A waiver is an excellent means of avoiding the disruption and uncertainty of a protest because GAO will not review a protest involving an alleged OCI if a waiver has been properly processed. Oddly, however, the "waiver" provision is rarely utilized by agencies. Instead agencies often elect to ignore the OCI or assert that it is not "significant." In other instances, the agency head or designee is reluctant to make a decision because it might be criticized.

A FRESH START FOR THE SUBPART?

In *FAR* Case 2011-001, the *FAR* Council sought to address OCIs. The proposed change to the *FAR* considered:

> Moving coverage of unequal access to nonpublic information and the requirement for resolving any resulting unfair competitive advantage out of the domain

> of OCIs and treating it separately in FAR Part 4. Competitive integrity issues caused by unequal access to nonpublic information are often unrelated to OCIs. Therefore, treating this topic independently will allow for more targeted coverage that properly addresses the specific concerns involved in such cases….

This rulemaking has languished for *over five years*. However, one pundit asserts as a basis for optimism that on June 6, 2016, the *FAR* Council announced a proposed rule to delete the terms "telegram" and "telegraph" from the *FAR*. According to the pundit, if the *FAR* Council can recognize that *telegrams* and *telegraphs* are no longer relevant to government contracts, there is hope that the *FAR* Council will someday do more than just propose a rulemaking for FAR Subpart 9.5.

With the *FAR* Council unlikely to remedy the failure of FAR Subpart 9.5 to provide meaningful guidance on OCIs, these words of wisdom will have to suffice:

> [A]ll procurement professionals have to be highly competent in dealing with OCIs. However, since the *FAR* is obsolete [in this regard], the rules have to be learned from the litigated cases. This is a tough way for [procurement professionals] to exist, but it seems to be nature of the beast. CM

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ENDNOTES

1. FAR 2.101.
2. *Dell Services Corporation*, B-414461.2 (June 21, 2017).
3. *ARINC Eng'g Servs., LLC v. United States*, 77 Fed. Cl. 196, 203 (2007).
4. Daniel Gordon, "Organizational Conflict of Interest: a Growing Integrity Challenge," *Public Contract Law Journal* (Fall 2005).
5. *See ARINC Eng'g Servs., LLC v. United States*, 77 Fed. Cl. 196, 203 (2007) ("[F]or an organizational conflict of interest to exist based upon unequal information, there must be something more than mere incumbency….").
6. FAR 9.508(c)-(d).
7. DFARS 242.771.
8. FAR 9.508(c).
9. GAO B-295462 (March 2, 2005).
10. FAR 2.101 (emphasis added).
11. *See* FAR 1.102-3(a).
12. FAR 9.504(a)(2) (emphasis added).
13. *Q2 Administrators, LLC*, B-410028 (October 14, 2014) (emphasis added).
14. *QualMed, Inc. v. Office of Civilian Health & Medical Program of Uniformed Services*, 934 F. Supp. 1227 (D. Colo. 1996).
15. *Turner Construction Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011).
16. FAR 9.504(a)(2) (emphasis added).
17. FAR 9.580(h)(1)-(2).
18. *L-3 Services, Inc.*, B-400134 (September 4, 2009).
19. B-310100 (November 2, 2007).
20. B-299522.5 (December 30, 2008).
21. *L-3 Services, Inc.*, *see* note 18.
22. *Ibid.*
23. *See International Resources Group*, B-409346.2 (December 11, 2014).
24. FAR 3.101-1.
25. FAR 9.505.
26. FAR 9.503 (emphasis added).
27. The "designee" is usually the head of contracting activity.
28. *See, e.g., AT&T Government Solutions, Inc.*, B-407720 (January 30, 2013).
29. For an agency head to decline to approve a waiver is consistent with the adage that "the fastest way to succeed in Washington is to avoid making decisions." (J. Fox, *Arming America* (Harvard University Press, 1974): 84.)
30. 76 *Fed. Reg.* 23236 (April 26, 2011).
31. 81 *Fed. Reg.* 36245.
32. Ralph Nash, "Postscript IV: Organizational Conflicts of Interest," *Nash & Cibinic Report* (May 2010).