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Conflicts of Interest

Conflicts of Interest Haven't Swamped Contractors' Prospects

At a time when the potential for conflicts of interest to unravel ambitions is receiving national attention, alleged conflicts seldom hurt government contractors' prospects for contract awards.

The Government Accountability Office (GAO) issued 38 protest decisions involving organizational conflicts of interest (OCI) in 2016, but only three of these found problematic conflict evaluations by contracting agencies.

A review of Court of Federal Claims (COFC) decisions in recent years revealed even fewer successful OCI-related challenges, which involve claims that a company has an unfair advantage in a contract competition or may not act impartially during performance.

Broad Discretion. A major reason for the low number of successful OCI protests is the high level of discretion agencies' contracting officers (COs) have in determining whether a significant conflict exists, Jon W. Burd, a partner with Wiley Rein LLP in Washington, told Bloomberg BNA.

A 2011 Federal Circuit decision, which supported deference for meaningful OCI assessments, provided contracting officers with a "much better road map to follow" and gave the GAO "more defined boundaries" when reviewing OCI protests, Burd said.

Lawrence M. Prosen, a partner with Kilpatrick Townsend in Washington, agreed, adding that "short of a showing of unreasonableness, irrationality or illegality, OCI protests are difficult to win."

The government has previously shown concern for OCIs in federal contracting, Scott H. Amey, general counsel for the Project on Government Oversight, a nonpartisan government watchdog organization, told Bloomberg BNA. However, a "few changes to the Federal Acquisition Regulation (FAR) later, I'm not surprised that there has been a drop in OCI cases as it became harder to challenge a contract officer's decision. For example, the shift from avoiding OCIs to resolving them makes challenges less likely to succeed and, as a result, fewer protests are filed," he said.

Contractors that operate with and benefit from an OCI "are certainly harming the integrity of the procurement system," Amey said. "Government buying should avoid bias and be beyond reproach, but that doesn't seem to be the case as policy makers keep signing off on pro-contractor reforms."

Unfair Advantage. Under FAR 9.5, contracting officers are required to assess if OCIs exist, and mitigate significant potential conflicts before making an award decision.

Organizational conflicts of interest occur when a competitor:

- has a competitive advantage from unequal access to information;
- benefits from improper influence over contract competition rules; or
- if a competitor could leverage a relationship in a way that precludes impartial performance for the government.

Contracting officers can work with contractors to develop conflict mitigation plans, such as establishing firewalls between contractor personnel and specific contract work.

"If a mitigation occurs, then another competitor may protest that the OCI was not really mitigatable," Prosen said. "These are very hard to prove as they are extremely fact-intensive."

Likewise, he said, a contractor may protest an agency's determination that the contractor has an unmitigatable OCI and demand inclusion in a contract competition. "Again, this is very fact-intensive and deferential by the tribunal," he said.

Little Protest Success. Despite dozens of OCI-related claims, the GAO has issued only three decisions sustaining such protests in 2016.

The GAO said:

- The Department of Veterans Affairs (VA) didn't adequately consider whether a government contractor with multiple information technology orders could fairly assess its own performance of other orders for the department.

- The Air Force didn't properly consider whether a cyberwarfare operations awardee had improper access to a competitor's staffing plan.

- The Department of the Interior failed to document whether an information technology awardee was in a position to review the performance of its parent company.

The Court of Federal Claims issued even fewer decisions finding fault with OCI reviews from 2014 to 2016.

During this period, the court ruled that the VA correctly rescinded a task order after learning that the awardee's prior work gave it improper access to solicitation documents, and that the Occupational Safety and Health Administration should have assessed whether a

firm seeking a training services contract had unequal access to nonpublic information.

Several factors contribute to the lack of OCI protest success, especially contracting officer discretion over conflict assessments and a legal framework that allows contractors to fix problems prior to award decisions.

Such flexibility prior to award decisions appears to keep down the number of successful OCI protests.

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