

IMPAIRED OBJECTIVITY ORGANIZATIONAL CONFLICTS OF INTEREST: AVOIDANCE AND MITIGATION

Background: In recent decisions, the Government Accountability Office (the “GAO”) has identified specific contractor activities that may result in an impermissible impaired objectivity organizational conflict of interest (“OCI”)¹. Impaired objectivity OCIs can exist where a firm’s work under one government contract requires the firm to develop policies and regulations that may affect products manufactured by that firm or its competitors. OCIs can also occur when government contractors attempt to acquire or divest corporate assets. As a result, government contractors must be aware of the OCI rules applicable to contract awards when deciding which opportunities to pursue, when drafting OCI Mitigation and Avoidance Plans, and when deciding whether to protest an award made to another contractor.

The GAO’s Recent Decisions Regarding Impaired Objectivity OCIs

- In *Alion Science and Technology Corp., B-297342, et al.*, Jan. 9, 2006, the GAO sustained two bid protests to the Defense Information System Agency’s (“DISA’s”) award of a contract to a division of ITT Industries, Inc. (“ITT”). The contract called for ITT, a manufacturer of spectrum-dependent products, to employ subjective judgment while formulating policies and regulations that “may have a positive or negative effect on the sale or use of spectrum-dependent products” manufactured by ITT, its competitors and customers.
 - The GAO sustained Alion’s protest stating that “the agency failed to reasonably identify and evaluate potential OCIs associated with ITT’s performance of the contract and, accordingly, failed to reasonably evaluate the effect that such OCIs will have on ITT’s contract performance.” The GAO applied the rationale in *PURVIS Sys., B-293807.3*, Aug. 16, 2004, by determining that impaired objectivity OCIs are not limited to acquisition-related activities, but can arise any time the performance of a contract involves the contractor’s exercise of judgment that could affect other contractor-related interests.
 - In failing to recognize this point, the agency compiled a procurement record that the GAO held was “devoid of any meaningful analysis regarding the scope of spectrum-dependent products manufactured by ITT, the scope of such products manufactured by ITT’s competitors or any consideration of the composition of ITT’s customer base, including foreign governments, and the spectrum-management interests of those customers.”

¹ Two other types of OCIs also exist: “unequal access to information” and “biased ground rules.” They are discussed along with impaired objectivity OCIs at Federal Acquisition Regulation (“FAR”) Subpart 9.5.

- In *Greenleaf Constr. Co.*, B-293105.18 *et al.*, Jan. 17, 2006, the GAO sustained a bid protest to the United States Department of Housing and Urban Development's ("HUD's") award of a management and marketing ("M&M") services contract to Chapman Law Firm Company, LPA ("CLF"). *Greenleaf* argued that HUD failed to reasonably consider or evaluate potential OCIs resulting from the fact that the owner of CLF would be receiving payments from the owner of the closing agent contractor, Lakeside Title, the activities of which CLF was required to oversee. When the proposal was submitted to HUD, Lakeside was owned by CLF's owner.
 - To mitigate potential OCIs, CLF transferred full ownership of Lakeside to another escrow and title attorney. However, the purchase agreement provided that 50 percent of Lakeside's profits through 2005 be paid to CLF. CLF subsequently amended the purchase agreement to provide that the purchase price would be paid to CLF at a certain rate for a specified number of weeks. Because this constituted a "final fixed price," HUD determined that this arrangement eliminated potential OCIs.
 - However, the GAO sustained *Greenleaf's* protest and held that the OCI had not been mitigated because CLF's judgment and objectivity in overseeing the activities of the closing agent could be impaired if performance of its oversight duties could potentially impact the ability of the owner of the closing agent to make its weekly payments to CLF. While a variety of issues brought the case before the United States Court of Federal Claims, the Court did agree that, among other things, "[t]o implement corrective action, HUD must review ... whether an organizational conflict of interest still exists...."

Transactions Involving Impaired Objectivity OCIs

- The \$2.1 billion acquisition of Anteon International Corp. by General Dynamics Corp. on June 8, 2006 was conditioned on the divestiture of certain Anteon contracts that were determined by the Department of Justice to present potential OCIs. Pursuant to an asset purchase agreement, Alion Science & Technology agreed to acquire Anteon's program management and engineering services businesses, which have contracts valued at \$225 million with the Navy and Air Force. Alion's acquisition of Anteon's contracts demonstrates the attention and reaction to OCI issues in the government contracting industry.

Practitioner Tips

- Impaired objectivity OCIs may be the most difficult type of OCI to mitigate and a thorough and well-planned Avoidance and Mitigation Plan is recommended. If a company identifies a potential OCI, it should consider submitting an Avoidance and Mitigation Plan with its proposal, especially since Contracting Officers are independently required to identify potential OCIs "as early in the acquisition process as possible."
- As demonstrated in the GAO's decision in *Greenleaf* and Alion's recent purchase of certain assets from Anteon, a contractor must be aware of potential OCI issues arising out of mergers, acquisitions, or divestitures. A contractor should be prepared to address government concerns regarding potential OCIs and for a planned merger or acquisition to be conditioned on the divestiture of certain contracts that present OCI issues.
- OCIs might be mitigated by shifting work to a subcontractor that deals directly with the Government and that signs a Non-Disclosure Agreement prohibiting certain communication with the prime contractor.

- OCIs might be mitigated by declining to seek award of a particular task order, particularly under a multiple award Indefinite Delivery Indefinite Quantity (“ID/IQ”) contract.
- OCIs might be mitigated by securing a waiver from the Contracting Officer.

Venable LLP assisted in representing the successful protesters in PURVIS Sys. and Alion Science and Technology Corp. Additionally, Venable represented Alion in its acquisition of Anteon’s divested contracts.

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