



OCI Waivers: The Ultimate Bid Protest Trump Card

A recent decision highlights the government’s authority to waive organizational conflicts of interest to defeat allegations raised in a protest.



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The rules pertaining to organizational conflicts of interest (OCIs) under Federal Acquisition Regulation (FAR) subpart 9.5 exist to eliminate bias, prevent unfair competitive advantage, and ensure the government’s interests are protected.

Despite the fundamental importance of these rules, the FAR provides that an appropriate agency official “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.”¹

The recent decision of the

Government Accountability Office (GAO) in the protest of *Accenture Federal Services, LLC* highlights the power of this extraordinary waiver provision to neutralize a threatening OCI protest.² Indeed, the case illustrates how agencies can use an OCI waiver as a “trump card” to defeat protest grounds that may have prevailed if decided on the merits.

Contractors and agencies should know how the waiver authority may be invoked and the impact a waiver has on the resolution of OCI bid protests. They also should understand that while the OCI waiver provision applies to each type of OCI under FAR subpart 9.5, GAO has ruled that this authority does not extend to similar “OCI-like” allegations under FAR § 3.1.

OCI Background

An OCI is defined as a situation where, “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.”³

FAR subpart 9.5 contains the “responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest.”⁴ It also includes “examples to assist contracting officers in applying these rules and procedures to individual contracting situations.”⁵

Agencies are required “to identify potential OCIs as early as possible

in the procurement process, and to avoid, neutralize, or mitigate significant conflicts before contract award so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity."⁶

Bid protest decisions "broadly categorize OCIs into three groups: biased ground rules, unequal access to nonpublic information, and impaired objectivity."⁷

A biased ground rules OCI arises "where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing or providing input into the specifications or statement of work."⁸

An OCI involving unequal access to information "exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract."⁹

Finally, an impaired objectivity OCI "is created when a contractor's judgment and objectivity may be impaired because the contractor's performance has the potential to affect other interests of the contractor."¹⁰

The three types of OCIs recognized under FAR subpart 9.5 may be waived by the "agency head or a designee" who may not be "below the level of head of a contracting activity."¹¹ The regulation specifies that "any request for waiver must be in writing, shall set forth the extent of the conflict, and

requires approval by the agency head or a designee."¹²

Protest of Accenture Federal Services, LLC

This protest involved a task order awarded to Deloitte Consulting, LLP for Human Capital Operations Support (HCOS) services for the Department of Homeland Security, Transportation Security Administration. Accenture challenged the award on various grounds including that the award to Deloitte was tainted by conflicts of interest.

The HCOS solicitation combined different services that were performed by Accenture and Deloitte under separate contracts. Accenture alleged that Deloitte's incumbent work created unequal access to information and impaired objectivity OCIs. This work included task orders for agency-wide information technology (IT) support and personnel actions, payroll, and benefits services.

Specifically, Accenture claimed that Deloitte gained "unparalleled inside information" by performing the IT support work, "which provided Deloitte an unfair advantage in preparing its HCOS proposal."¹³

Moreover, Accenture alleged the objectivity of Deloitte's "recommendations regarding technology changes" under the HCOS contract would be impaired because it will implement those changes under its separate task order.¹⁴

After Accenture's initial protest, the agency took corrective action to review Deloitte's allegations, document its OCI findings, and make a new award. The contracting officer ultimately determined there were no

conflicts of interest "because the HCOS task order is 'strictly services'" whereas the existing task order was "strictly technology enhancements."

Although the contracting officer acknowledged that Deloitte would make recommendations for technology changes under the HCOS task order, she found that Deloitte's objectivity would not be impaired. She noted the agency retained the authority to review and approve or disapprove the recommended changes.

The agency again selected Deloitte for award and Accenture filed a new protest alleging that the agency's OCI determination was unreasonable. In the midst of the protest, GAO convened a conference call with the parties and raised questions about the contracting officer's conclusion that Deloitte's objectivity would not be impaired because the agency would ultimately "make decisions regarding whether or not to pilot/adopt the changes proposed."¹⁵

In previous cases, GAO has held that "[t]he fact that the agency retains final approval or decision-making authority does not absolve the agency of assessing whether a conflict can arise."¹⁶ It appears that GAO was signaling to the parties in the conference call that at least the "impaired objectivity" protest ground likely had merit.

After GAO's conference call, however, the head of the contracting activity for TSA executed an OCI waiver pursuant to FAR § 9.503. The waiver described Accenture's allegations and was intended to encompass "all potential OCI concerns within the HCOS award."¹⁷

The agency did “not necessarily confirm or deny that an OCI exists,” but concluded that a waiver was appropriate even if any “residual OCIs might exist” because “any potential concern does not outweigh the magnitude to which this contract impacts the agency.”¹⁸

Accenture challenged the validity of the OCI waiver in a supplemental protest that attacked the contracting officer’s underlying investigation into the substance of its OCI allegations. GAO’s decision focused on the narrow question of whether the agency’s waiver complied with the requirements of FAR § 9.503.

When an agency executes an OCI waiver, GAO will review “whether it is in writing, sets forth the extent of the conflict, and is approved by the appropriate individual within the agency.”¹⁹ GAO denied the protest because it concluded that the waiver satisfied these requirements.²⁰

GAO noted that “an agency need not concede that a protester’s allegations are correct as a condition to executing a valid waiver.”²¹ In other words, the agency can defend the substance of OCI allegations in a protest. And simultaneously, it also can execute a waiver as an insurance policy against a potential adverse decision.

A Limited Exception to OCI Waiver Authority

The *Accenture* decision demonstrates how an agency can effectively moot substantive OCI allegations by following the relatively straightforward waiver requirements under FAR § 9.503.

Agencies and contractors should be aware, however, that GAO has held

that the waiver authority does not apply to a specific type of unequal access to information allegations covered under FAR subpart 3.1.²²

As previously discussed, an unequal access to information OCI under FAR subpart 9.5 arises in a situation “where a contractor has access to non-public information as part of its performance of a government contract, or where the contractor possesses information improperly provided by a government employee.”²³

In GAO’s view, this type of OCI allegation is different from challenges under FAR subpart 3.1 that are “based on an offeror’s hiring or association with *former* government employees who have access to non-public, competitively useful information.”²⁴

GAO distinguishes between concerns arising under FAR subpart 3.1 and FAR subpart 9.5 because “an unfair competitive advantage arising from the hiring of a former government employee does not implicate the contractor’s access to information through that contractor’s performance of a government contract or from a *current* government employee.”²⁵

As a result of this distinction, GAO has held that an allegation of unequal access to information that falls within the ambit of FAR subpart 3.1 cannot be waived pursuant to FAR § 9.503.²⁶

The regulatory basis for GAO’s distinction between challenges under FAR subpart 3.1 and FAR subpart 9.5 is unclear. Specifically, although FAR § 9.505(b) generally prevents an unfair competitive advantage arising from information “obtained from a government official,” the regulation

does not specify that the official must be a *current* government employee.

Moreover, FAR § 3.104-3(a) prohibits the knowing disclosure of “contractor bid or proposal information or source selection information” made by “a present *or* former official.”

Conclusion

The waiver authority under FAR § 9.503 is an extraordinary tool that agencies can use to neutralize OCI bid protest allegations. However, there are legitimate questions as to whether it is a sound policy to allow agencies to invoke the waiver authority as an end-run around the established OCI rules.

The prospect of a waiver is especially problematic for biased ground rules and unequal access to information OCIs. In these situations, the OCI causes direct harm to competing contractors and the integrity of the procurement system. Where an impaired objectivity OCI is at issue, it is the agency itself that is harmed by biased recommendations. It is therefore somewhat easier to accept the proposition that agencies have discretion to waive that type of OCI.

In late 2022, Congress enacted the Preventing Organizational Conflicts of Interest in Federal Acquisition Act.²⁷ It directs the FAR Council to update the OCI regulations set forth in FAR subpart 9.5 to include definitions, guidance, and illustrative examples regarding the various types of OCIs.

The act also requires the FAR Council to provide agencies with standard OCI solicitation and contract clauses that can be tailored based on agency-specific considerations.

The existing OCI regulations have remained largely unchanged since the original publication of the FAR in 1984.²⁸ Although the act does not specifically require any change to the OCI waiver provision under FAR § 9.503, it is conceivable that the FAR Council could propose some modifications to that authority as part of the updates required by law. Interested parties who believe changes to the waiver authority are warranted should submit comments once the proposed rule is published.²⁹ **CM**

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ENDNOTES

- 1 FAR § 9.503
- 2 See Accenture Federal Services, LLC, B-421134.2, et al., Apr. 12, 2023, 2023 WL 2931283.
- 3 FAR § 2.101.
- 4 FAR § 9.500(a).
- 5 FAR § 9.500(b).
- 6 Sigmatech, Inc., B-415028.3, B-415028.4, Sept. 11, 2018, 2018 CPD ¶ 336 at 8.
- 7 Id.
- 8 Interactive Information Solutions, Inc., B-415126.2, B-415126.3, et al., Mar. 22, 2018, 2018 CPD ¶ 115 at 4 (citing FAR §§ 9.505-1, 9.505-2).
- 9 Sigmatech, 2018 CPD ¶ 336 at 8 (FAR §§ 9.505(b), 9.505-4).
- 10 Steel Point Solutions, LLC, B-419709, B-419709.2, July 7, 2021, 2021 CDP ¶ 254 at 3 (citing FAR §§ 9.505, 9.508)
- 11 FAR § 9.503.
- 12 Id.
- 13 Accenture, 2023 WL 2931283 at *5.
- 14 Id.
- 15 Id. at *6.
- 16 Inquiries, Inc., B-417415.2, Dec. 30, 2019, 2020 CPD ¶ 54 at 8 (citing Nortel Gov't Solutions, Inc., B-299522.5, B-299522.6, Dec. 30, 2008, 2009 CPD ¶10 at 6-7; Johnson Controls World Servs., Inc., B-286714.2, Feb. 13, 2001, 2001 CPD ¶20 at 12).
- 17 Accenture, 2023 WL 2931283 at *6.
- 18 Id.
- 19 Id. at *7.
- 20 Id.
- 21 Id.
- 22 Northrop Grumman Sys. Corp., B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312.
- 23 Id. at 8.
- 24 Id. (emphasis added).
- 25 Id. (emphasis added).
- 26 Id.
- 27 See Pub. L. 117-324.
- 28 76 Fed. Reg. 23236, 23237 (Apr. 26, 2011).
- 29 The Acquisition Law Team is currently working on a proposed rule under FAR Case No. 2023-006.

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