Updates
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Impaired Objectivity and the Ability to Influence: Avoiding Pitfalls in Mitigating OCI

A common source of organizational conflicts of interest (OCI) is when a firm's ability to render impartial advice to the government is or might be undermined by the firm's competing interests. These OCIs, termed "impaired objectivity" OCIs often arise in service contracts where the contractor is tasked with evaluating a product or service. A contractor will be considered conflicted if its relationship to the evaluated product or service impairs the contractor's objectivity. Unless it can present an acceptable mitigation plan to the agency, the conflicted contractor may only receive the contract if the agency seeks a waiver of the conflict.

By examining two recent bid protest decisions from the Government Accountability Office (GAO) we discuss the standard applied to determine whether an OCI exists, and how contractors can successfully mitigate an existing OCI.

Influence Matters

Safal Partners, Inc., B-416937, 2019 CPD ¶ 20 (Jan. 15, 2019), involves a classic OCI fact pattern and instructs that the contractor's ability to give impartial advice is the touchstone for an impaired objectivity OCI. The protester there challenged the award of a technical assistance contract under the U.S. Department of Education (DOE) Charter Schools Program (CSP) to a company whose subcontractor, WestEd, also held a CSP monitoring and data collection contract with DOE. Under the monitoring and data collection contract, WestEd developed individualized reports with recommendations for CSP grantees to ensure project performance. Under the technical assistance contract, the contractor would provide individualized support to the grantees based on the reports generated under the monitoring and data collection contract. The protester alleged that the subcontractor stood to benefit financially by recommending grantees for technical assistance under the monitoring and data collection contract.

Rather than explicitly determine whether WestEd had an OCI, the contracting officer concluded that because WestEd lacked authority to make final determinations on monitoring and technical assistance to grantees (that authority remained with the DOE) WestEd could not funnel work to itself. The GAO found this reasoning deficient.

Like other agency decisions, the GAO reviews an agency's OCI determination for reasonableness. Indeed, it is well established that where an agency gives meaningful consideration to whether an OCI exists—even if the consideration is given *after* award—the GAO will not substitute its judgment for that of the agency's. Nevertheless, the GAO sustained the protest in *Safal Partners* because the contracting officer only considered the contractor's authority to issue work to grantees. The GAO explained, "even where the agency is not relying solely on the contractor's input, and where the government retains the ultimate decision-making authority" an OCI may exist because of the ability to influence. The ultimate question—and the standard that the contracting officer should have applied—is whether the firm's ability to render impartial advice to the government is affected.

Firewalling: More Than a Buzzword

As is often the case with a GAO "reasonableness" test, there are no hard and fast rules as to what must be included in a proper mitigation plan for impaired objectivity OCIs. The sufficiency of the plan depends on the specific facts of the procurement and the OCI involved.

The recent decision of *Leidos, Inc.*, B-417994, 2019 WL 7019036 (Dec. 17, 2019), is instructive on this point. The government disqualified Leidos and its subcontractor from a contract for the U.S. Air Force's Common Computing Environment (CCE) cloud procurement for managed cloud services. Leidos protested the agency's determination that the subcontractor's work on an existing requirement stood to impair its judgment on the CCE contract, and that the subcontractor had failed to sufficiently mitigate the OCI in its mitigation plan. As discussed below, the GAO agreed with the agency that the subcontractor presented an unmitigated impaired objectivity OCI.

The conflict stemmed from the subcontractor's concurrent performance on a contract for the Air Force's Enterprise Information as a Service (EITaaS) program. Like the CCE contract, the EITaaS contract related to the Air Force's digital transformation, and the subcontractor served as an advisor on how to transform existing programs, including CCE.

The subcontractor acknowledged a potential impaired objectivity OCI but claimed that no actual OCI existed as none of its current work under EITaaS involved making recommendations as to CCE; further, any migration of the CCE program to the EITaaS program was not scheduled for the foreseeable future.

The GAO disagreed with Leidos and its subcontractor's contentions that no OCI existed. The agency was reasonably concerned that it might not receive objective advice because the subcontractor would have a vested interest in ensuring that the CCE contract was maximized and that all option years are exercised, specifically because the CCE is a labor hour contract for the migration element of the services. As the GAO explained, "impaired objectivity OCI is not limited to situations in which a contractor is evaluating its own or a competitor's work. Rather, an impaired objectivity OCI is concerned with whether the contractor's performance on one contract can affect other interests of the contractor."

The subcontractor's mitigation plan consisted of two pillars: internal firewalling of employees and recusal from providing advice under EITaaS if it would affect CCE. According to the GAO, the agency reasonably concluded that the plan did not mitigate the impaired objectivity OCI. First, the GAO observed that a firewall around certain employees was "irrelevant" because the conflict pertained to the organization, not to the individual employees. The firewall around the EITaaS team would not prevent the personnel under either program from being incentivized to benefit their company. Second, the recusal aspect of the subcontractor's plan failed to explain who would perform the work if recusal became necessary. This was problematic as the subcontractor was considered a key advisor under the EITaaS program. Further, the EITaaS contract did not give the subcontractor unilateral authority to recuse itself in the event of a conflict. GAO denied the protest.

The *Leidos* and *Safal Partners* decisions reinforce GAO's view that the ability to influence is the touchstone for an impaired objectivity OCI. Further, *Leidos* instructs that in developing a mitigation strategy, contractors should be aware that internal firewalls are likely insufficient where the conflict applies to the company as a whole and not to specific personnel. Finally, contractors should ensure that they have the authority to recuse themselves before proposing recusal as a form of mitigation, and, if so, should identify who would perform the work in their absence.

Authors

Seth Locke

Partner
SLocke@perkinscoie.com 202.654.6267

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