

Client Alert.

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GAO Dismisses Protest Based on a *Post-Hoc* Waiver of OCIs

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The U.S. Government Accountability Office (GAO) recently opened the door for government agencies to use their waiver authority under the Federal Acquisition Regulation (FAR), Subpart 9.5, during a protest to render academic a protester's claim of potential organizational conflicts of interest (OCI). *AT&T Government Solutions, Inc.*, B-407720, B-407720.2, Jan. 30, 2013, 2013 CPD ¶ ___. Although waivers of OCIs under FAR Subpart 9.5 are not unusual, it is uncommon for an agency to waive an OCI during the pendency of a protest, as the Marine Corps did in *AT&T Government Solutions, Inc.*

AT&T'S ALLEGATIONS OF POTENTIAL OCIS

On July 3, 2012, the Marine Corps issued a request for proposals to contractors holding a Navy SeaPort-e indefinite-delivery, indefinite-quantity (ID/IQ) contract for a task order to provide IT networking support services for the Marine Corps' secret Internet protocol router network (SIPRNet) at five Marine Corps installations. After receipt and evaluation of proposals, the Marine Corps awarded the task order to Jacobs Technology, Inc. ("Jacobs") on September 27, 2012.

Disappointed offeror AT&T Government Solutions, Inc. (AT&T) filed an initial agency-level protest, which was dismissed. On October 23, 2012, AT&T filed its protest at the GAO, alleging that the Marine Corps failed to meaningfully consider the potential OCI presented by awarding the task order to Jacobs. In particular, AT&T claimed that Jacobs' role as a support contractor to the Marine Corps on a related engineering and acquisition support task order in support of the program manager, Marine Corps network and infrastructure services (PM MCNIS) created two types of OCIs (as defined under FAR Subpart 9.5). First, Jacobs had access to non-public budget information and technical requirements that may have provided Jacobs with a competitive advantage in preparing its proposal. Second, Jacobs would be unable to render impartial advice to the Marine Corps due to its role as both the PM MCNIS engineering and acquisition support contractor and the SIPRNet support service contractor.

In an investigation prompted by the protest, the agency determined that no actual or potential OCI existed. During an outcome prediction alternative dispute resolution conference, however, the GAO attorney assigned to the protest indicated that the GAO was inclined to sustain the protest because the record showed that the agency failed to meaningfully consider the potential OCIs alleged by AT&T.

THE AGENCY'S WAIVER OF OCIS

Three days before the 100-day statutory deadline for the GAO to resolve the protest, the Marine Corps notified the GAO that it had waived any OCIs relating to the award to Jacobs. Pursuant to Section 9.503 of the FAR, the

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agency head or 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.”

The head of the contracting activity (HCA) for the Marine Corps exercised the authority of FAR § 9.503 and waived “any and all residual OCI concerns and potential impacts which are not completely eliminated or otherwise neutralized or mitigated by the circumstances described in the analysis developed in support of this waiver.” The HCA wrote that he had found that the risk of any potential or real OCI under the task order was negligible to non-existent, the potential residual impact of the OCI was insignificant in comparison to the estimated annual savings to be derived from award to Jacobs as well as the substantive impact of disrupted support to the SIPRNet, and that re-procurement was not an option due to the limited number of qualified sources and the loss of critical support services during the time needed to conduct a new procurement.

GAO’S DECISION

Relying on the agency’s waiver of any OCIs with respect to Jacobs, the GAO dismissed the protest on January 30, 2013. The GAO held that the FAR permitted the Marine Corps to waive any general rules or procedures within Subpart 9.5, and since AT&T’s protest arose from the rules and procedures of Subpart 9.5, the waiver rendered AT&T’s claims academic.

IMPLICATIONS FOR FUTURE PROTESTS

The decision in *AT&T Government Solutions, Inc.* seems to confirm the GAO’s broad view of the waiver authority in FAR Subpart 9.5. Although the GAO has consistently held that agencies can use the waiver provision as an alternative to avoiding, neutralizing, or mitigating an OCI, agencies typically only exercise this option during the decision-making process or through corrective action. In this case, the Marine Corps waited until just days before the GAO’s decision was due to execute a waiver. The outcome in this protest underscores the impact OCIs can have on a procurement, as well as the virtually unlimited power of the agency to waive OCIs. In the wake of *AT&T Government Solutions, Inc.*, we may see other government agencies attempt to defeat claims of OCIs by exercising their waiver authority following the filing of OCI-related protests. Future protests may challenge the exercise of such waivers where they are clearly inappropriate, but this case may have a chilling effect on OCI challenges in the near term.

The full decision can be found [here](#).

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