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A Retreat From Hard Line OCI Decisions? The COFC Overturns A Controversial GAO Ruling

By Anne B. Perry and Jessica M. Madon

On July 16, 2010, the Court of Federal Claims ("COFC") determined that a Government Accountability Office ("GAO") bid protest recommendation that an awardee, Turner Construction Co. ("Turner"), be disqualified on the basis of organizational conflicts of interest ("OCI") under an Army Corps of Engineers (the "Army") hospital renovation contract was irrational. *See Turner Construction Co., Inc. v. United States*, Fed. Cl., No. 10-195C, July 16, 2010. We previously discussed the implications of the GAO decision here.

Factual Background

To understand this case, one has to follow the bouncing ball a little bit to keep the players straight.

The Army issued a two-phased RFP in June 2008. In Phase I, the Army evaluated offerors based upon performance and capability information and selected three offerors to move to Phase II:

- McCarthy/Hunt, JV ("McCarthy/Hunt")
- B.L. Harbert-Brasfield & Gorrie, JV ("Harbert/Gorrie") and
- Turner
    - Turner in turn engaged Ellerbe Becket ("EB"), a healthcare-focused architectural and engineering firm, to serve as a subcontractor for the procurement.

Prior to issuing the solicitation, the Army entered into a design contract for technical assistance through the hospital renovation procurement with a joint venture created by

- Hayes, Seay, Mattern & Mattern ("HSMM") and
- Hellmuth, Obata & Kassbaum, Inc. ("HOK").
    - Throughout the procurement of the hospital renovation project, HSMM was owned by AECOM.

Approximately a year before the Army issued the hospital renovation RFP, the Board of Directors of Turner's subcontractor (EB) began exploring various business opportunities and decided to attempt to sell itself by auction. In June 2008, five firms, including AECOM, expressed interest in acquiring EB and signed confidentiality agreements with EB. Once AECOM signed the confidentiality agreement, EB's management conducted confidential presentations to AECOM and AECOM was granted access to EB's data room to conduct due diligence.

Approximately 30 AECOM employees were involved in the due diligence investigation, but none of those 30 employees were part of the HSMM team that worked on the HSMM/HOK design contract. AECOM and two other firms eventually bid on EB, and EB's owners authorized further negotiations with AECOM and one other firm. In November 2008, all negotiations were terminated and access to the data room was closed. Several months later, however, in May 2009, EB and AECOM renewed discussions and on August 12, 2009, AECOM submitted a formal Letter of Interest, which was approved by EB's Board of Directors. The merger concluded October 22, 2009 and was publically announced on October 26, 2009.

And so it came to pass that Turner's subcontractor was merged into the owner of one of the co-venturers performing the design services for the Army in connection with the construction contractor for which Turner was a competitor.

One AECOM executive was familiar with both the hospital renovation procurement and the potential deal between AECOM and EB. This executive became aware of the potential OCI between AECOM, as parent of HSMM, and EB when he attended an Army Industry Day in August 2008. Once the negotiations between the two companies were suspended, the executive decided not to inform the Army about his concern. In July 2009, however, once the negotiations between AECOM and EB had resumed, this executive brought his concerns to the attention of the contracting officer ("CO"). The executive proposed recusing himself and the CO agreed that his recusal would "sufficiently prevent any possible conflict of interest."

Just after AECOM and EB publically announced their merger, McCarthy/Hunt and Harbert/Gorrie filed post-award protests at GAO alleging "biased ground rules," "impaired objectivity," and "unequal access to information" OCIs. After the protest was filed, the CO conducted a full investigation to determine if there were any OCIs and presented her findings to the GAO. The GAO sustained the "unequal access to information" and "biased ground rules" allegations and recommended a reprocurement. Based on the GAO decision, the Army decided not to waive the OCIs and followed GAO's recommended course of action. Shortly after the Army made its decision not to waive the OCIs, Turner filed a protest with the COFC.

COFC Decision

In the context of a bid protest, the COFC reviews agency procurement decisions to determine if they are "arbitrary and capricious" or "lack a rational basis." If the agency procurement action in question is the following of a GAO recommendation, then the agency's decision will be found to lack a rational basis only if the GAO recommendation "is itself irrational."

This is precisely what COFC found in *Turner*. In fact, the COFC held that the GAO failed to meaningfully consider the CO's findings and substituted its own judgment for that of the CO's by determining that the record indicated that AECOM had "special knowledge" that would have given Turner an unfair advantage. The COFC found that GAO improperly discounted the CO's post-award investigations and findings because the CO conducted the investigation after the contract award and it was GAO's view that the FAR requires the CO to "identify and evaluate" potential conflicts "before contract award." The COFC determined, however, that the GAO conflated two separate FAR requirements –(1) to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (2) to avoid, neutralize, or mitigate significant potential conflicts before contract award. FAR 9.504(a)(1)-(2). By merging these two requirements, the COFC found that GAO ignored the possibility that in some cases the earliest possible time to evaluate an OCI could be post-award. The COFC also emphasized that not all OCIs require avoidance, neutralization, or mitigation – only *significant* OCIs do.

Moreover, the COFC held that "hard facts," as opposed to suspicion and innuendo, are needed to show the existence of an OCI. In other words, while the harm from an OCI may be inferred, there must be hard facts that underlie the finding of the OCI in the first instance. Here, the COFC determined that the GAO both inferred the existence of an OCI, and then inferred the harm arising therefrom. Absent hard facts demonstrating the existence of an OCI, the COFC determined that the GAO could not rationally overturn the CO's decision that there were no conflicts of interest. The COFC explained that:

> The GAO decision here, in contrast, only points to "familiar[ity] with the details" and potential "access to competitively useful information" and being "in a position to obtain information." This is not specific enough to have overturned the agency's OCI determination, and it was irrational for the GAO to do so. Because the GAO decision was irrational, the Army was not justified in relying on it.

The Court found that GAO had summarily assumed that, during the course of the potential merger discussions, the parties were "effectively aligned" and had a "community of interests" whereas the CO had determined, based on a post-award analysis of the facts, that the parties were merely "potential merger partners, with no community of interests." Since GAO had not identified any hard facts of a "sufficient alignment of interests," COFC found that GAO's assumption of such an alignment was irrational. GAO's conclusion that there was a "biased ground rules" OCI (where an offeror skews the competition in its favor) was similarly

determined to be irrational because the COFC found that GAO again ignored the CO's detailed factual findings and analysis that demonstrated a lack of opportunity to skew the competition. Rather, GAO opted to assume that there was the opportunity to skew the competition unfairly and thus ignored all of the actual facts showing that the competition was not skewed. The same lack of any hard facts was found with respect to GAO's view that there was an "unequal access OCI." Again, GAO was held to have improperly relied upon the possibility that the party had inside information. Reiterating the requirement for hard facts, the COFC held that the GAO needed to find "the 'possession' of undisclosed, competitively useful information" before finding such an unequal access OCI.

Where does this leave us?

The COFC's rejection of the GAO's findings is significant and it remains to be seen how the GAO will react. Because they are two independent tribunals, neither the GAO nor the COFC is required to follow the precedent of the other. In the context of OCI cases, GAO has long been of the view that a CO's failure to identify and evaluate an OCI before award was lethal – finding that post award analyses violated the FAR and were not credible. The COFC has now specifically rejected that reading of the FAR. Additionally, it is unclear whether the COFC's establishment of a requirement for "hard facts" supporting the existence of an OCI is inconsistent with and thus may also alter GAO's future analyses.

Probably the biggest lesson learned is that simply winning a protest at GAO does not safely pave the way to victory. While there are no direct "appeal" rights from a GAO decision, the COFC has the independent jurisdiction to review the underlying procurement decisions and, in the case of a GAO decision finding an award improper and recommending corrective action, an agency's decision to follow that recommendation subjects even GAO's decision to that review.

Authored By:

Anne B. Perry
(202)218-6875
aperry@sheppardmullin.com

and

Jessica M. Madon
(202) 469-4919
jmadon@sheppardmullin.com