Organizational Conflicts of Interest – Confusion Caused the FAR

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I. Introduction.

Just as a major purpose of the Uniform Commercial Code is to promote certainty and predictability in commercial transactions, so too a major purpose of the Federal Acquisition Regulation ("FAR") is to promote certainty and predictability in federal government contracting. However, one area where the FAR falls woefully short of providing certainty and predictability is FAR Subpart 9.5, which addresses Organizational Conflicts of Interest ("OCI's"). As discussed below, the FAR's definition of an OCI is often inaccurate and confusing. The FAR utilizes conclusory standards with little practical guidance for both government contractors and contracting officers alike.

The FAR defines an OCI as follows:

> "Organizational conflict of interest" means that 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.

FAR § 2.101.

Unfortunately, this broad definition provides little practical guidance regarding the types of specific activities or relationships that might give rise to an OCI. As a practical matter, the GAO has indicated that OCI's typically fall into one of three categories[1]:

1. ***Unequal access to information*** **–** where a contractor has access to nonpublic information that would provide an unfair competitive advantage;

2. ***Biased ground rules*** – where a contractor, as part of its performance of another government contract, has set "ground rules" that would give it an unfair competitive advantage for future contracts; and,

3. ***Impaired objectivity*** – where a firm's work under one contract could entail its review or evaluation of itself under another contract.

II. The "Unfair Competitive Advantage" Category Misses the Mark.

Of the three OCI categories identified by the GAO, at least two of them (unequal access to information, and biased ground rules) depend upon whether or not a particular activity affords the contractor an "unfair competitive advantage." Accordingly, when evaluating OCI's, one source of great difficult arises from attempting to define what constitutes an "unfair competition advantage." Somewhat graciously, the Court of Federal Claims has described the "unfair competitive advantage" category as "nettlesome to apply, particularly in cases where the awardee has performed on related contracts.[ii]

Adding to confusing nature of this standard is the difficulty of fitting it within a traditional conflict of interest framework. As explained by leading scholar on OCIs:

> While one could say that every company has an obligation to compete without unfair advantages, calling this an OCI seems like a semantic stretch. Having an unfair competitive advantage, notably, is not related to the biased judgment that is otherwise the hallmark of a conflict of interest. Even in the situation where an unequal access to information case sounds most like an OCI – where a firm has access to nonpublic information due to its work under a period contract and that information may help the firm in competing for a future contract – the situation would be just as troubling if the firm had never held a prior government contract, but had instead gained access to the nonpublic information by, for example, receiving in through an inadvertent disclosure by the government, or by hacking into the government's computer files or bribing a government official – or, for that matter, through industrial espionage. The problem in those cases is that the competition is tainted, not that the taint arose due to a firm's prior contract. That is not to say that unfair competitive advantages are good – but it may be confusing and inappropriate to say that they create an organizational (or any other kind of) conflict of interest.[iii]

Problematically, the FAR's adjective "unfair" is a mere conclusion without any meaningful guidance. For example, while a position of incumbency undoubtedly carries significant competitive advantages, mere incumbency itself is not considered to be an "unfair" competitive advantage.[iv]

In an attempt to shed light on what constitutes an "unfair" competitive advantage, FAR § 9.508 provides several "examples" where a significant competitive advantage may appear to exist, but where no OCI will be found:

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.

In these examples, the FAR seemingly acknowledges the existence of a competitive advantage but does not conclude that the advantage is "unfair" such that it rises to the level of an OCI. Instead, the FAR appears to conclude that these potential advantages are either unavoidable, or perhaps even beneficial to the government. For example, DFARS § 242.771 expressly encourages defense contractors to engage in research and development activities that could pose a competitive advantage in procurements of potential interest to the Department of Defense.

Attempting to predict when a competitive advantage becomes an "unfair" competitive advantage can be a perplexing task. To illustrate, the GAO has upheld a finding of an OCI in a situation which is remarkably similar to example (c) above, where the FAR otherwise suggests that no OCI should be found. In *Lucent Technology World Services*[v] the contracting officer concluded that Lucent had an OCI arising from its preparation of the technical specifications in the solicitation. The GAO denied a protest of that decision and upheld the contracting officer's decision to exclude Lucent's proposal. In reaching that decision, the GAO noted that the contracting officer had broad discretion to avoid even the "appearance" of an unfair competitive advantage that might compromise the integrity of the procurement process.

Contributing to the perplexity of defining an "unfair" competitive advantage, the decision in *Lucent* indicates that, not only will an OCI disqualify a contractor if it is actually "unfair" (which is difficult enough to define) but also when it merely "appears" unfair. FAR § 2.101 supports this approach by defining an OCI as something that renders a contractor "unable or <u>potentially</u> unable to render impartial assistance…." As a result, government contractors are placed in the situation of having to surmise not only whether they actually have a competitive advantage that is "unfair," but also whether they may be <u>perceived</u> as having such an advantage. This is particularly problematic in an environment of vigorous competition, where even a minimal advantage to one contactor is likely to be argued as unfair by potential competitors. Ironically, the result is that the "unfair competitive advantage" standard, if taken to the extreme, is contrary to the

intended purpose of the federal acquisition process of meeting the government's requirements in terms of "cost, quality, and timeliness" by disqualifying firms that are most advantageously situated to provide the goods or services.[vi]

III. Deciding "Significance" Can Be Uncertain And Unpredictable.

FAR § 9.504(a)(2) tasks contracting officers to "[a]void, neutralize, or mitigate **significant** potential conflicts before contract award." According to the GAO:

> The FAR recognizes that conflicts may arise in factual situations not expressly described in the relevant FAR sections, and advises contracting officers to examine each situation individually and to exercise common sense, good judgment, and sound discretion in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it.[vii]

In some situations, a potential OCI which at first seems insignificant may later be found significant. To illustrate, compare the sagas of two different protesters involving federal litigation: *QualMed, Inc. v. Office of Civilian Health & Medical Program of Uniformed Services*[viii], and *Turner Construction Co. v. United States*[ix]: In *QualMed*, the contractor's teaming partner had acquired a company that was a support contractor for the procuring agency and participated in the evaluation of proposals. The contractor brought the potential OCI to the attention of the agency and submitted a mitigation plan which involved implementation of a "Chinese Wall." Although the mitigation plan was approved by the contracting officer, the GAO subsequently found that the plan was inadequate to address the OCI and recommended that contractor be disqualified from award. That decision was affirmed by a United States District Court.

Compare that result to the one in *Turner Construction*, which involved an Army contract to build a new hospital at Fort Benning. In a complex web of connectivity, the parent company of one of the companies that designed the hospital was performing due diligence to acquire one of subcontractors proposed to build the hospital. The potential OCI was brought to attention of the contracting officer, who did not regard it as significant. In a subsequent bid protest, the GAO found that a biased ground rules and unequal access to information OCI existed. However, that decision was overturned by the Court of Federal Claims on grounds that the GAO had irrationally disregarded and improperly substituted its own judgment for the findings of the contracting officer.

In *QualMed,* the contracting officer's determination of not a significance OCI was reversed by the GAO; the reversal was upheld by the federal court. By contrast, in

Turner Construction, the contracting officer's determination of not a significant OCI was upheld based on deference given by the court to the contracting officer's judgment. Thus, the unpredictability as to the amount of deference a court will give to a contracting officer's determination of a OCI not being significance can be a problem to parties who wants to avoid the disruption of a successful protest.

IV. Inadequate Guidance on Mitigation.

FAR § 9.504(a)(2) tasks contracting officers to "[a]void, neutralize, or mitigate significant potential conflicts before contract award." (Emphasis added). However, the only guidance in the FAR on mitigating an OCI is provided at FAR § 9.508(h):

> (h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field to make proprietary information available to Company A. The contract must require Company A to –
>
> > (1) Enter into agreement with these firms to protect any proprietary information they provide; and
> >
> > (2) Refrain from using the information in supply lasers to the Government or for any purpose other than that for which it was intended.

As illustrated above, FAR § 9.508(h) describes an "unequal access to information" OCI. Following this guidance, an agreement by a contractor to limit its use of information may be sufficient to mitigate an OCI arising from unequal access to information. Thus, the GAO has observed that '[w]here a prospective contractor faces a potential unequal access to information organizational conflict of interest, the conflict may be mitigated through the implementation of an effective mitigation plan."[x]

The timing of a contractor's mitigation effort is crucial, and after-the-fact mitigation efforts may be unsuccessful. In *VRC, Inc,*[xi] a contractor protested the Army's decision to disqualify it from a procurement where an individual employed by a company with ownership ties to the protestor was assigned to work in the agency's contracting office in connection with the procurement at issue. Thus, an "unequal access to information" OCI existed. VRC asserted that it had implemented "firewall arrangements" that the contracting officer should have found sufficient to mitigate any OCI. The contracting officer found that, had the OCI been raised earlier in the procurement process, it might have been possible to mitigate it. However, because the conflict was not raised until two days after the proposals were submitted, the contracting officer saw no way to mitigate the conflict and instead decided to avoid the conflict

altogether by rejecting the proposal. The contracting officer's decision was upheld by the GAO.

While it is fairly clear that "unequal access to information" OCIs can be mitigated by implementation of an effective mitigation plan, the question arises whether "impaired objectivity" or "bias ground rules" OCIs can be similarly mitigated. In *Nortel Government Solutions*,[xii] the GAO held that a firewall did not avoid, mitigate or neutralize the impaired objectivity OCI resulting from a contractor's performance of dual roles reviewing and providing input on its own designs.

Similarly, in *L-3 Services, Inc.*, the GAO sustained a protest where the contractor had a "biased ground rules" OCI and found that the contractor's unsupervised and "self-executing" mitigation plan was inadequate to address the OCI. The GAO stated: "With respect to the biased ground rules organizational conflict of interest, the ordinary remedy where the conflict has not been mitigated is the elimination of that competitor from the competition." While the GAO's decision referenced the possibility of mitigation, it provided no guidance as to what steps the contractor could have taken to effectively mitigate the "biased ground rules" OCI.

V. No Guidance on "Hard Facts"

The GAO has made clear that a protestor must identify "hard facts" that indicate the existence or potential existence of a conflict, and that mere inference or suspicion of an actual or potential conflict is not enough.[xiii] Meanwhile, the FAR itself provide conflicting guidance. FAR Subpart 9.5 makes no mention of "hard facts." Instead, FAR § 3.101-1 states: "The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships."

The result is that if a losing offeror seeks to protest on grounds of a perceived OCI, the protestor will be held to a high standard, requiring "hard facts" to sustain the protest. Meanwhile, if the government decides to exclude a protestor on grounds of a perceived OCI, the government may do so based upon even the mere "appearance" of a conflict.

VI. Underutilized "Waiver" Provision.

In addressing OCI's, FAR § 9.505 instructs that the government should consider "two underlying principles": (1) preventing the existence of conflicting roles that might bias a contractor's judgment; and (2) preventing unfair competitive advantage. As an

exception to the OCI rules, FAR § 9.503 allows an agency to waive an OCI based upon "Government interest":

> The agency head or a 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. Any request for waiver … requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

(Emphasis added).

Unfortunately, the FAR provides no guidance on when it "would not be in the Government's interest" to prevent bias or unfair competitive advantage. The waiver provision could be interpreted as allowing the agency to determine that the government's interest in obtaining a particular benefit or advantage outweighs the interest in avoiding an OCI.

Where a contracting officer cannot avoid, neutralize or mitigate a significant conflict of interest before award, but award to the apparent winner is in the best interest of the Government, the agency can process a waiver under FAR § 9.503. The waiver must be approved by the agency head or designee.[xiv] A waiver is an excellent means of avoiding the disruption and uncertainty of a protest because the GAO will not review a protest involving an alleged OCI is a waiver has been properly processed.[xv] Oddly, the waiver provision is rarely processed by agencies. Often agencies elect to ignore the OCI or assert that it is not significant. In other instances, the agency head or designee is reluctant to make a decision because it can be easily criticized. Hence, for an agency head to issue an OCI waiver would not be consistent with the adage that "the fastest way to succeed in Washington is to avoid making decisions."[xvi]

VII. Is There Hope For FAR Subpart 9.5?

In FAR Case 2011-001, the FAR Councils sought to address OCIs. For example, the proposed change to the FAR considered:

> Moving coverage of unequal access to nonpublic information and the requirement for resolving any resulting unfair competitive advantage out of the domain of OCIs and treating it separately in FAR part 4. Competitive integrity issues caused by unequal access to nonpublic information are often unrelated to OCIs. Therefore, treating this topic independently will

> allow for more targeted coverage that properly addresses the specific concerns involved in such cases….[xvii]

This rulemaking has languished for over five years. One might find solace that on June 6, 2016, the FAR Councils announced a proposed rule to delete the terms "telegram" and "telegraph" from the FAR.[xviii] Albeit cynical, if the FAR Councils can recognize that telegraphs are no longer relevant to government contracts, there is hope that the FAR Council will someday do more than just propose a rulemaking for FAR Subpart 9.5. For now, however, Professor Nash has best summed up the situation:

> [A]ll procurement professional have to be highly competent in dealing with OCIs. However, since the FAR is obsolete, the rules have to be learned from the litigated cases. This is a tough way for COs to exist but it seems to be nature of the beast.[xix]

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Dell Services Corporation, B-414461.2 (June 21, 2017)

ii *ARINC Eng'g Servs., LLC v. United States*, 77 Fed. Cl. 196, 203 (2007).

iii Gordon, Daniel, *Organizational Conflict of Interest: a Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25 (Fall 2005).

iv *See ARINC Eng'g Servs., LLC v. United States*, 77 Fed. Cl. 196, 203 (2007) ("[F]or an organizational conflict of interest to exist based upon unequal information, there must be something more than mere incumbency….").

v GAO B-295462 (Mar. 2, 2005).

vi FAR § 1.102-3(a).

vii *Q2 Administrators*, LLC, B-410028 (Oct. 14, 2014).

viii 934 F. Supp. 1227 (D. Colo. 1996).

ix 645 F.3d 1377 (Fed. Cir. 2011).

x *L-3 Services, Inc*, B-400134 (Sep. 4, 2009)

xi B-310100 (Nov. 2, 2007)

xii B-299522.5 (Dec. 30, 2008)

xiii *International Resources Group*, B-409346.2 (Dec. 11, 2014).

xiv FAR § 9.503. The designee usually in the Head of contacting activity.

xv *AT&T Government Solutions, Inc*., B-407720 (Jan. 30, 2013).

[xvi] J. Fox, *Arming America* (Harvard University Press 1974) at 84.

[xvii] 76 *Fed. Reg.* 23236, April 26, 2011.

[xviii] 81 *Fed. Reg*. 36245.

[xix] "Postscript IV: Organizational Conflicts of Interest," 24 No. 5 *Nash & Cibinic Report* ¶ 25 (May 2010)