

# ***What Caused The Sea Change In OCIs?***



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← **Contracting  
Officers**

# Outline

- I. OCIs -- The Turf Of Lawyers
- II. The Omen – GAO’s QualMed Decision
- III. “Significant” OCIs Less Distinguishable
- IV. Findings Of OCI Generally Upheld
- V. The Demise of Firewalls
- VI. Restructured Unfair Competitive Advantage

# OCIs – The Turf Of Lawyers

“Contracting officers  
should obtain the advice  
of counsel ... in evaluating  
potential conflicts.”

*FAR § 9.504(b)*

# The Omen--GAO's QualMed Decision

The underlying procurement was for managed health care in California for CHAMPUS beneficiaries who included military members and their dependents. The estimated value of the contract was > \$2.5 billion.

QualMed proposed Lewin-VHI as a subcontractor for mental health

# The Omen--GAO's QualMed Decision

“QualMed asked the agency for guidance about resolution of the potential organizational conflict of interest. **QualMed indicated that it could submit a proposal without VBH's participation**, if the Lewin–VHI affiliate's involvement posed a problem for OCHAMPUS.”

# The Omen--GAO's QualMed Decision

“Agency counsel and the contracting officer responded that the agency had experience in this area, and that, so long as QualMed submitted an acceptable plan for mitigation of the conflict, the agency would approve it and VBH could serve as QualMed's subcontractor.”



# The Omen--GAO's QualMed Decision

The approved mitigation plan stated that CHAMPUS “employees will subject Lewin–VHI's work to close scrutiny in a manner determined by the agency; ... will review all work product prepared by Lewin–VHI; ... will perform final review and clearance of all work product prior to its use; and ... will review the data against Lewin–VHI's interpretation to ensure that it is sound.”.

# The Omen--GAO's QualMed Decision

The GAO stated: “The protests here reflect the third type of organizational conflict of interest, involving potentially impaired objectivity, in that they concern the propriety of Lewin–VHI's evaluating proposals where that evaluation could determine whether its affiliate would receive a \$183 million subcontract.”



# The Omen--GAO's QualMed Decision


Reason #1 for sustaining protest:

“Based on our review of the entire record, we conclude that the 1994 plan presented the facts in such a way as to fail to alert OCHAMPUS to the scope and significance of the organizational conflict of interest.”

# The Omen--GAO's QualMed Decision

Reason #2 for sustaining protest:

“As to OCHAMPUS, the agency failed to take reasonable steps to learn the relevant facts about the organizational conflict of interest.”

A decorative graphic consisting of several sets of concentric circles, resembling ripples in water, is located in the bottom right corner of the slide. The circles are light blue and vary in size, with the largest set being the most prominent.

# The Omen--GAO's QualMed Decision

QualMed challenged the GAO decision in USDC. The court held that, notwithstanding that QualMed arguably was not to “blame” for the OCI, blame was not relevant to a finding that an OCI existed.

QualMed, Inc. v. OCHAMPUS, 934 F. Supp.  
1227 (D. Col. 1996).

# “Significant” OCIs Less Distinguishable



Contracting officers must “avoid, neutralize, or mitigate **significant** potential conflicts of interests”

*FAR § 9.504(b)*

# **“Significant” OCIs Less Distinguishable**

## **Test**

“Company A develops new electronic equipment and, as a result of this development, prepares the specification.”

## **Question**

May Company A supply the equipment?



# **“Significant” OCIs Less Distinguishable**

## **Answer**

**Yes. Company A may supply the equipment.**

***FAR § 9.508(c)***

# **“Significant” OCIs Less Distinguishable**

“Thus, the agency failed to properly consider the potential that Northrop Grumman will experience impaired objectivity in performing this contract and failed in its obligation under the FAR to identify and evaluate potential conflicts of interest.”

*PURVIS Systems, B-293807.3. Aug16, 2004*

# **“Significant” OCIs Less Distinguishable**

“while the contracting officer was aware of the potential OCI ... it is clear that the contracting officer failed to consider the OCI implications of the amended version of the purchase agreement”

*Greenleaf Constr. Co., Mar 8, 2006, B-293105.18*

# **“Significant” OCIs Less Distinguishable**

“we find unpersuasive the agency’s attempt to portray the review work giving rise to an impaired objectivity OCI as insignificant in terms of the EMS contractor’s overall level of effort.”

*Nortel Govt Solutions, B-299522.5, Dec 30, 2008*

# “Significant” OCIs Less Distinguishable

“When protests have been sustained on OCI grounds, it is usually because the agency failed to identify an OCI, or, having recognized a potential OCI, failed to deal with it.”

*D. Gordon, “Organizational Conflicts of Interest,” 35 Pub. Cont. L.J. 25 (2005)*



# **“Significant” OCIs Less Distinguishable**

## **Lesson Learned**

To avoid the risk of being overturned by the GAO, C.O.s are inclined to treat every potential OCI as significant

# Findings Of OCI Generally Upheld By GAO

Protest challenging agency's exclusion of an offeror from a procurement was denied where the agency reasonably determined that the protester has an OCI arising from its preparation of technical specifications used by the agency in the solicitation.

*Lucent Tech, B-295462, March 2, 2005*

# Findings Of OCI Generally Upheld By GAO

A C.O. excluded the protester from the competition because a subcontractor of protester owned a significant portion of a company that had access to source selection information. The GAO denied the protest finding the C.O.'s decision reasonable.

*VRC, Inc., B-310100, Nov. 2, 2007*

# Findings Of OCI Generally Upheld By GAO

Protest that agency improperly excluded offeror from competition where the wife of the offeror's president serves as a contracting officer is denied because the agency decision was a reasonable attempt to avoid the appearance of impropriety.

*Asia Resource Partners, B-400552, Nov 5, 2008*

# Findings Of OCI Generally Upheld By GAO

## Lessoned Learned

When confronting an OCI, a C.O.'s decision to exclude an offeror from the competition is unlikely to be second guessed by the GAO



# The Demise Of Firewalls

“However, the GAO has held a firewall to be insufficient in several situations. For example, the GAO recently held that firewalls were ‘virtually irrelevant’ for mitigating impaired objectivity OCIs.”

Mergers & Acquisitions, 09-7 BP

# The Demise Of Firewalls

“Even in ‘unfair access to information’ OCIs, which firewalls can usually mitigate, firewalls have been held insufficient when there is evidence that the firewall has been breached.”

Mergers & Acquisitions, 09-7 BP

# The Demise Of Firewalls

“Also, if the nature of the activities involved in the OCI are too interrelated, a firewall may not be sufficient.”

Mergers & Acquisitions, 09-7 BP

# The Demise Of Firewalls



## Lesson Learned

A C.O. may not readily accept a firewall as a means to overcome an OCI.

# Restructured Unfair Competitive Advantage

OCI “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 (emphasis added)



# Restructured Unfair Competitive Advantage

“What of the final phrase of the definition--“a person has an unfair competitive advantage”? It is something of a challenge to fit it into the conflict framework.”



D. Gordon, “Organizational  
Conflicts of Interest,” 35 Pub.  
Cont. L.J. 25 (2005)

# **Restructured Unfair Competitive Advantage**

“A contractor could have an unfair competitive advantage in an acquisition as a result of having performed work on a Government contract ... that put the contractor in a position to influence the acquisition.”

*76 Fed Reg 23236, Apr. 26, 2011*

# Summary

- The last several years has seen a Sea Change in OCIs
- The Sea Change has been brought about by GAO attorneys

