

ALERT

OCIs—Reports of Their Demise as a Legitimate Protest Ground Appear Premature

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WHAT: The Government Accountability Office (GAO) sustained a protest filed by Inquiries, Inc., challenging the award of the contract to iWorks Corporation. Inquiries argued five different grounds for the protest, and GAO sustained two—one being disqualifying organizational conflicts of interest (OCIs). GAO sustained the protest because, even though the agency had investigated the alleged OCIs, the record did not show meaningful consideration of the potential conflicts arising from iWorks' own work or the work of its subcontractor.

WHEN: On February 5, 2020, GAO released the public version of its December 30, 2019 decision.

WHAT DOES IT MEAN FOR THE INDUSTRY: Contracting officers (COs) are required to avoid, neutralize, or mitigate potential significant OCIs to prevent unfair competitive advantage or the creation of conflicting roles that might impair a contractor's objectivity. Over the last five years, there has been a sharp downward trend in GAO sustaining bid protests involving OCIs, including as a result of an uptick in OCI waivers and seemingly increasing GAO deference to agencies' OCI analyses. This trend has suggested that agencies were gaining more and more discretion when deciding whether an OCI is significant enough to warrant any action. However, this recent case shows GAO stepping in when the CO cannot provide thorough documentation. It also demonstrates that contractors must be diligent in understanding potential conflicts posed by their subcontractors and that OCIs can still be a successful ground of protest.

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Government Contracts

In this case, the contract required the awardee to support two of the Defense Vetting Directorate (DVD) in two separate centers. The work involved supporting the DVD's background investigation and clearance adjudication processes and required the use of the Defense Information System for Security (DISS). Previously, iWorks performed a contract for the Defense Logistics Agency where it provided support for the development, design, and implementation of DISS, and iWorks' proposed subcontractor Xcelerate had responsibilities under a different DVD contract that would conflict with its assigned role under this contract. Inquiries pointed to iWorks' previous connection to DISS and Xcelerate's current role in another DVD contract as OCIs that would impair the contractor's objectivity.

GAO found that although the CO did conduct an analysis for these potential OCIs, it was unreasonable and not meaningful. On the subcontractor claim, the CO did not thoroughly describe the work that Xcelerate performed under the other contract or provide further details into any reports or discussions cited as the evidence of why no OCI existed.

Turning to the CO's analysis of iWorks, GAO had to decide whether the CO meaningfully analyzed whether iWorks could provide unbiased feedback on a system—here, DISS—that it built. The GAO found that the CO's analysis for iWorks again lacked documentation and relied on unsupported conclusions. The CO seemed to rely on the popularity of DISS among other agencies as a reason why iWorks' previous involvement with the system would not affect its ability to provide feedback on the system. However, the CO offered no explanation into how DISS's popularity cleared up the OCI.

Overall, the GAO sustained the protest by concluding that the contracting officer's OCI analysis did not meaningfully or reasonably consider the significant potential impaired objectivity OCIs identified by the protester. Further, GAO found that the agency did not provide adequate details concerning the information reviewed and that the agency's analyses relied on unreasonable assumptions concerning mitigating effects on potential bias arising from the contractor's conflicting obligations.