

Not quite good enough: COFC finds agencies' OCI investigations fall short

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Organizational conflicts of interest (OCI) are troubling for both the government and contractors. Under FAR 2.101, an OCI is a situation where "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." In an OCI investigation, a contracting officer (CO) should assess OCI risk during the pre-award and post-award procurement processes.

Recent Court of Federal Claims (COFC) cases

On August 2, 2021, Judge Solomson issued his decision in *Oak Grove Technologies, LLC v. United States*. The unsuccessful offeror, Oak Grove Technologies (OGT), filed a bid protest challenging the United States' award to the successful offeror, F3EA. In the complaint, OGT questioned the agency's award decision and raised numerous challenges regarding the evaluation process.

OGT also provided evidence that F3EA had allegedly improperly benefited from unequal access to information and biased ground rules. Essentially, OGT argued that an OCI tarnished the award.

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During a hearing, the court questioned the integrity of the procurement and recognized that OGT was not treated with the fairness required under the Federal Acquisition Regulation (FAR). The court ultimately granted OGT's motion and the agency was prevented from proceeding with the award to F3EA.

On August 16, 2021, Judge Holte ruled in *American K-9 Detection Services, LLC v. United States*, which involved two consolidated bid protests against the United States Postal Service (USPS). In this case, American K-9 Detection Services, LLC brought a pre-award bid protest. Because the USPS continued with award and performance of the contract, American K-9 later amended its complaint to

include a post-award protest. Global K9 Protection Group, LLC filed an additional post-award bid protest.

The protestors alleged that the USPS failed to mitigate potential OCI risk and supported that allegation with evidence of unequal access to information and biased ground rules.

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The court ordered a remand, requiring the USPS to complete another OCI investigation. This was the second remand ordered by the court because of the USPS CO's failure to conduct a proper OCI investigation.

What standard does the COFC apply when scrutinizing agency OCI investigations?

In both *American K-9 Detection Services, LLC v. United States* and *Oak Grove Technologies, LLC v. United States*, the court found the COs failed to avoid, neutralize, or mitigate potential OCI. To reach that conclusion, the court applied the arbitrary and capricious standard outlined in 5 U.S.C. § 706 of the Administrative Procedure Act (APA). Application of 5 U.S.C. § 706 to OCI investigations enables courts to determine whether an agency's assessment lacked a rational basis.

Courts deem an agency's decision as arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Application of 5 U.S.C. § 706 does not substitute the court's judgment for that of the agency.

Why are agencies coming up short?

In *American K-9 Detection Services, LLC*, the court probed at the administrative record for facts that indicated the CO identified the existence or potential existence of conflict. However, the evidence presented supported the contrary. The CO's OCI investigation insufficiently assessed OCI risk during the procurement process.

The CO failed to do the following:

- (1) Adequately investigate whether the successful bidder obtained the necessary clearance.
- (2) Analyze conflicting reports from the awardee and the other agency.
- (3) Substantiate the record.

Consequently, the court found the agency's OCI determination lacked a rational basis and was arbitrary and capricious.

The detriment experienced by a contractor and an agency because of OCI is avoidable.

Because the agency failed to conduct a thorough OCI investigation, the court ordered a remand requiring the agency to reopen the OCI investigation and abide by guidelines set forth by the court. The agency's reassessment was to conclude with a complete representation of the events that occurred pre- and post-determination of OCI risk. The agency's new summary report will reflect details pertaining to the recent OCI decision and the additional information obtained. Consequently, information pertaining to OCI risk will be more readily ascertained.

The court in *Oak Grove Technologies, LLC* determined that to review an OCI investigation effectively, it must receive an administrative record detailing the agency's decision-making process. To the

court's disappointment, the agency failed to provide a complete record. After numerous requests by the court, the agency eventually submitted the previously omitted documents. Such "unacceptable" conduct undermined the court's ability to evaluate the OCI investigation properly. However, with a full administrative record, the court pinpointed additional agency shortcomings.

Specifically, the court found the following:

- (1) The agency deemed an actual offeror as an unsuccessful offeror. Inhibiting the contractor from bidding completely impeded their chance of receiving the award.
- (2) The agency failed to enforce the mandatory teaming requirement detailed in its solicitation. By failing to comply with its requirements, the agency caused another OCI.
- (3) The agency failed to exercise its discretion reasonably. Such failure is evidenced in the agency's choice not to engage in discussions concerning the procurement circumstances.

Each of the preceding acts was improper. The agency's haphazard conduct impacted the fairness and integrity of the procurement. The court found that the protestor sufficiently demonstrated that the agency's conduct was arbitrary and capricious; thus, granting the protestor's motion and ordering the agency to fix the procurement.

Key takeaways for government contractors

Overall, the detriment experienced by a contractor and an agency because of OCI is avoidable. Both parties must proactively and promptly communicate about potential risks, investigate conflicts, and establish a plan to mitigate those risks.

However, as these cases illustrate, disappointed bidders should press OCI concerns to confirm that agencies have adequately reviewed and documented their OCI investigations. Here, the COs did not fulfill their responsibilities and inadequately completed their OCI investigations, thus leading to prolonged procurements and necessary corrective action.

About the author



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