

Bid protest minute: Proving an organizational conflict of interest exists

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On December 20, 2023, the Government Accountability Office (GAO) denied¹ an unsuccessful bidder's protest, arguing, among other things, that the procurement was tainted by an appearance of impropriety after the agency appointed a senior executive from a competing firm, formerly responsible for their proposed technical approach, to be the agency's new director. According to the protester, the taint arising from the agency's action could only be cured by disqualifying the competitor and making an award to the protester.

The GAO decision underscores that while an Organizational Conflict of Interest (OCI) can be an extremely effective ground for protest, contractors considering making such allegations must be able to demonstrate beyond mere inference or suspicion that an OCI exists, particularly given that a Contracting Officer's (CO's) evaluation of OCI concerns is allowed broad deference.

The procurement at issue

On February 10, 2023, the National Aeronautics and Space Administration (NASA) issued an RFP for the procurement of a geostationary extended observations (GeoXO) sounder (GXS) instrument for the weather satellite program. The RFP contemplated the award of a cost-plus-award-fee contract. By the deadline of March 17, the agency had received proposals only from Ball Aerospace and L3Harris. On September 11, the agency notified L3Harris that the contract was awarded to Ball.

Where the record establishes that a conflict exists, the GAO will presume that the protester was prejudiced unless the record shows there is no prejudice.

On March 12, 2023, NASA's Goddard Space Flight Center (GSFC) hired a former senior Ball executive to be its director. The executive, who had headed Ball's civil space business, previously worked at Ball during the GXS procurement, where he "served as Vice President and General Manager for Civil Space ... [and] was responsible for all new business execution and financials."

The protester argued the appointment of the former Ball executive, who had been responsible for Ball's technical approach, created an unmitigated appearance of impropriety because the GXS Source Selection Authority (SSA) at NASA now reported to him. L3Harris argued that the conflict required that the award to Ball be terminated and Ball be disqualified from the GXS competition.

Generally, agencies are afforded broad discretion when evaluating whether an OCI exists.

NASA asserted that it had taken reasonable and appropriate steps to avoid or mitigate any conflict of interest, that L3Harris' allegations were speculative, and the record showed no conflict existed. According to NASA, the SSA was appointed after the Source Evaluation Board (SEB) was selected, and all participants in the procurement process were reminded of their obligations under the FAR, NFS, and Procurement Integrity Act.

Further, only "the SSA, SEB members, consultants, and *ex officio* agency participants were granted access to SEB information." In addition, the former Ball executive stated he divested all Ball assets and took steps to separate deferred compensation owed to him by Ball and place it in an index fund to ensure that the amount ultimately paid was not based on Ball stock price. Lastly, the SSA stated, "I did not consult or talk to [the Ball executive] regarding this procurement."

Discussion

FAR 3.101-1 provides that "[g]overnment business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none ... The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government contractor relationships."

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OCIs generally fall into one of three categories:

- (1) **Impaired objectivity:** This OCI arises in circumstances where a contractor somehow evaluates itself or makes recommendations as to current or future procurement priorities. GAO will look to “whether a firm is in a position to make judgments or recommendations that would have the effect of directly influencing its own wellbeing.”²
- (2) **Biased ground rules:** This OCI arises from situations where the contractor has somehow influenced the ground rules for the procurement, *e.g.*, preparing statements of work or procurement requirements.
- (3) **Unequal access to information:** This OCI arises from a contractor’s performance under one contract, which provides the contractor with information that is not publicly available, giving it an unfair competitive advantage. This may include the improper disclosure of source selection information.

While not mentioned in this GAO decision, violations of the Procurement Integrity Act can be another effective ground for protest if the circumstances provide.

Generally, agencies are afforded broad discretion when evaluating whether an OCI exists. L3Harris’ unsuccessful protest underscores this point.

GAO held that the record did “not establish any impropriety requiring Ball’s disqualification for award, or otherwise indicate that the SSA had a conflict of interest that prejudiced the protester.” The GAO went on to explain that the simple fact the SSA reports to the former Ball executive is inadequate to create a conflict of interest.

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The fact that neither the SSA nor the former Ball executive would financially benefit from Ball’s selection as the awardee further demonstrates there is no conflict.

Key lessons

The decision serves as a helpful reminder that establishing the existence of an OCI can sometimes prove difficult, particularly given the discretion afforded to agencies to evaluate OCIs and the sufficiency of mitigation plans. With that said, identifying one or more OCIs can be effective as protest grounds to the extent it is supported beyond mere inference or suspicion because once an OCI is established, it is presumed that the protester was prejudiced.

Also, while not mentioned in this GAO decision, violations of the Procurement Integrity Act (PIA) can be another effective ground for protest if the circumstances provide. The PIA prohibits the release of source selection and contractor bid or proposal information before the award of a federal agency procurement contract to which the information relates and bars federal officials from accepting compensation from contractors if they served in certain positions on a procurement action in excess of \$10 million.

It is crucial to remember that upon learning of a PIA violation, the contractor must disclose it to the federal agency responsible for the procurement within 14 days “after the person first discovered the possible violation” in order to preserve the right to raise the issue in a GAO protest.³

Overall, the L3Harris decision offers a useful example of the burden protesters must show to establish an OCI. Contractors should keep that in mind when considering their protest strategy.

Notes

¹ <https://bit.ly/49bp1zG>

² L-3 Services Inc., B-400134.11 *et al.*, Sept. 3, 2009, 2009 CPD ¶ 171.

³ 41 U.S.C. § 2106.