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Conflicts of Interest

If Agencies Can Waive Conflicts of Interest, Why Don't They?

BY DANIEL SEIDEN

Jacobs Technology Inc.'s \$779 million information technology contract award recently survived competitors' protests in part because the U.S. Special Operations Command invoked broad power to waive rules for organizational conflicts of interest, protests of which can upend awards.

A waiver is valid under the Federal Acquisition Regulation (FAR) if it serves the government's interest, and did so here by enhancing competition, the Government Accountability Office ruled.

But assuming robust competition is always desirable for an agency, why not always write up a waiver to ensure a conflict of interest protest doesn't slow down a procurement?

Three reasons, said Keith Szeliga, a Washington-based partner at Sheppard Mullin Richter & Hampton LLP:

- contracting officials believe conflicts of interest rules maintain a procurement's integrity;
- widespread waiver use could lead to "regulatory backlash," and
- conflicts rarely prevent an agency from selecting the contractor it wants.

The decision backing the Jacobs waiver also may have been too government-friendly in excusing strict adherence to the FAR's conflict of interest rules, Lawrence M. Prosen, partner with Kilpatrick Townsend & Stockton LLP, told Bloomberg Government.

Best Interest Contracting officials are required to avoid, neutralize, or mitigate conflicts of interest—such as an unequal access to private information—to prevent an unfair advantage in a contract competition under FAR 9.5.

However, the head of a contracting agency may waive FAR 9.5 procedures under FAR 9.503 if it serves the government's interest, and the government may rely on this provision to defeat a displeased offeror's protest.

A valid waiver must set forth the extent of a conflict in writing and be supported by the record, the GAO said in upholding Jacobs' award.

The agency justified the waiver by saying the inclusion of an experienced contractor like Jacobs would enhance the competition, the GAO found.

Procurement Integrity Valued So what is preventing a contracting agency from always using a FAR 9.503 waiver to stop any potential conflicts protests?

Most contracting officials recognize that conflicts of interest restrictions reflect sound procurement policy and "recognize their importance not only to the integrity of the procurement process, but also to ensuring that end users receive the best value," Szeliga said.

Frequent waivers "would create a perception of irregularity. No contracting official or agency wants to be perceived as condoning conflicts of interest or undermining the objectives of conflicts of interest rules. It is also likely that widespread use of waivers would result in a regulatory backlash to limit the waiver authority," he said.

Finally, conflicts of interest rules give contracting officials sufficient discretion such that waivers are rarely necessary, he said.

"There is simply no reason to waive conflicts of interest rules when, in most cases, a contracting official can determine that a conflict of interest does not exist, that it is not significant, or that it can be avoided, neutralized, or mitigated so as to permit award to the desired contractor," he stated.

'Government-Friendly Decision' Protesters CACI and General Dynamics alleged organizational conflicts of interest in a March 2016 protest of Jacobs' initial selection, which led to the competition reopening.

Agency personnel didn't approve of or issue a formal conflicts waiver for Jacobs until July 2016, after the filing of the original protest and only shortly before Jacobs received the award a second time.

When CACI and General Dynamics filed supplemental protests challenging the waiver, the contracting officer submitted a supplemental waiver request approved in October 2016.

The GAO's backing of the Navy's post-hoc conflict of interest waiver is cause for concern, Prosen said.

"This is a very government-friendly decision that could allow contracting agencies to avoid strict adherence to the conflict of interest provisions in FAR subpart 9.5, which is very specific," he said.

"The government appears to have done whatever it could to get the result it wanted, and there's an expectation that it should do its job concerning organizational conflicts of interest in the first place, prior to making an award or even earlier," he added.

The case is *CACI Inc.-Fed.*, GAO, B-413860, 1/5/18, decision released 1/18/18.

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