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REPORT

A Decade of GAO OCI Decisions: Is the Past the Prologue?

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On December 29, 2010, the Department of Defense issued a final rule regarding organizational conflicts of interest (''OCIs'') in major defense acquisition programs (''MDAPs''). The final MDAPs rule was narrowly confined to satisfy the dictates of Congress as expressed in Section 207(a) of the Weapon System Acquisition Reform Act (''WSARA'') (Pub. L. No. 111-23). The MDAPs rule may be seen as something of a withdrawal from the ambitions signaled by the proposed DFARS rule that had been issued for comment on April 22, 2010. *See* DFARS Case 2009-D015, 75 Fed. Reg. 20954 (proposed Apr. 22, 2010).

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In our view, DOD had receded from the proposed rules for several reasons. One was to avoid ''preemption'' of the FAR Council, which has been working on a new OCI rule of general applicability to federal procurement. A related reason was recognition that the proposed rule went much further than Congress required in WSARA. Also, DOD may have recognized some of the critical comments that followed release of the proposed rule. Criticisms that stand out include a concern that the proposed rule would effect industrial base change with uncertain effects or benefits. Another objection was that the rule might lack sufficient flexibility for a problem presenting so many complexities, raising the risk of ''formulaic'' rather than reasoned, ''case-specific'' determinations.

There are many reasons to expect, however, that the new rule now being considered by the FAR Council will draw on many of the concepts that were piloted in the proposed DFARS rule. Within the next several months, we can expect to see the FAR Council issue a proposed OCI rule for public comment. Considering the many perspectives and the complexities of the subject, it will be important for all parties concerned with the OCI subject to examine the proposed rule with great care and to provide thorough comments to the rulemakers.

Highlights & High-Level Observations. Below, we offer thoughts on what the data suggests for consideration in the context of the pending FAR rule.

About twice as many OCI cases were decided between 2006 and 2011 (45) as were decided between 2001 and 2005 (23). However, there is no discernible pattern in the number of decisions in the years between 2006 and 2011 YTD.	*Decided cases represent only a modest percentage of filed protests. The statistics suggest the FAR Council should seek greater clarity in the new rule so that the frequency of OCI protests will be reduced. However, at least initially, the new rule will generate bona fide issues of interpretation and application that will prompt protests. The FAR Council might aid the cause of reducing the volume of protests, and attendant disruption to acquisition, by including a clear statement of policy and purposes and workable OCI definitions.*
Unsurprisingly, the great majority (93 percent) of OCI cases decided were brought by a party that objected to an award decision on OCI grounds.	*The new FAR might wish to recognize the "2-step" procedure now used by some agencies, which essentially inserts an OCI "qualification" phase before proceeding with the "merits" of an acquisition. The qualification phase can include an internal opportunity for review or reconsideration, and disappointed bidders can protest if the object to exclusion or to other acts of OCI mitigation which may affect them adversely.*
OCIs most often were asserted against DOD and its components rather than against civilian agencies. For the entire 10-year period, nearly three-quarters of all OCI decisions concerned DOD.	*This might reflect the extrinsic circumstances of consolidation and compression of the DOD industrial base, as well as the increased emphasis on procurement of solutions and services. Although DOD has announced its intent to preserve competition at various tiers, continued acquisition of lower-tier, specialized firms by the larger, integrated firms suggests that OCIs will remain a problem especially significant to DOD for the indefinite future.*
Taken as a whole, the sustain rate on all OCI protests decided over the 10-year period was 19 percent. The sustain rate for the most recent 5-year period – 20 percent – is somewhat *less* than the overall sustain rate reported by the GAO to Congress for the same period, which ranged from 18 percent to 29 percent.	*GAO reported that between FY 2006 and FY 2010, there was an "effectiveness rate" (i.e., the protester received "some form of relief' from the agency) of between 39 and 42 percent. Protests are expensive and disruptive of the acquisition process. While it is imperative that review and redress be available, there is questionable net public benefit in perpetuating a situation where protests are so frequently successful and thus filings are incentivized (with little or no penalty if unmeritorious). Allowing that the new OCI rules will require definition by protest decisions to produce interpretative case law, the FAR Council should seek clarity in purpose and operation to discourage the filing unmeritorious OCI protests.*
However, the sustain rate for OCI cases brought by other than small businesses between 2006 and 2011 (YTD) was significantly higher (30 percent) than the average rate on all protests (including small business) decided over the same period.	*This high sustain rate points to what, perhaps, is an obvious proposition: the complexity and importance of OCIs has outstripped the foundation of the present FAR Subpart 9.5, and a more comprehensive treatment is required. Rigor and clarity on the "front end" of the acquisition, as the new rules might facilitate, could reduce the frequency (or success) of protests at the "back end."*
The most frequently claimed category of OCI was ''Impaired Objectivity,'' which figured in just over half (54 percent) of the decided cases. ''Unequal access to information'' was the next most frequently claimed type of OCI, followed by ''biased ground rules.''	*A common interest should be in seeing that OCI rules operate to protect public and private sector interests in the integrity of procurement and fair competition, and in assuring that the government receives the benefits of performance uncompromised by divided loyalties. The present "types" of OCIs essentially are ways for the facts of specific procurements to be assessed against these policy objectives. The FAR Council should establish definitions of OCI types by regulatory action rather than relying upon the accumulated GAO and COFC case law.*

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Generally, the Government Accountability Office was supportive of contracting officer decisions; where at issue, the GAO backed the CO in nearly three-quarter of the decisions.	*For the procurement system to be workable, the CO needs to have the tools which will enable confident and correct application of OCI rules to each procurement. A starting point will be new rules which better define OCI and articulate policies and purposes in light of contemporary acquisition conditions. The CO also needs to be well informed, which may suggest greater OCI disclosure obligations (as would have been imposed on contractors by the April 2010 proposed DFARS).*
The great majority of OCI decisions – nearly three-quarters — were concerned with ''potential'' rather than ''actual'' or ''apparent'' OCIs.	*Analytically, if a procurement is conducted properly and the CO is sufficiently informed, then "actual" OCI should be vetted early and surface only infrequently in protests. Today, the definition of "apparent" OCI is amorphous, because by definition it addresses neither an actual nor a potential OCI but a situation which, if only to a hypothetical observer, "appears" to suffer from a conflict. Clarity is needed or else the absence of a boundary to "apparent" OCIs will prove troublesome over time.*
Mitigation plans, however, did not fare well as the GAO rejected a mitigation plan in more than half the decisions in which mitigation plans figured in the decision.	*This statistic may speak to the analytical difficulty of fitting "mitigation plans" to types of OCIs other than "unequal access to information." As has been recognized by other commentators, where an OCI in the form of "impaired objectivity" is present, it is perhaps impossible to eliminate by mitigation the possibility that one part of an organization will be swayed by the interest of an affiliate. What can be done by mitigation, however, especially in conjunction with coordinated actions internal to the government, is to mitigate and manage the risk of adverse consequence from the OCI.*
Reflecting the proposition that OCI decisions arise only when an OCI protest is filed, and usually protests are filed by a disappointed bidder, in a majority of the decisions the principal OCI objective asserted was ''fair competition,'' versus comparatively less frequent focus on ''integrity'' or on the government's interest in ''disinterested contractor performance.''	*From a rulemaking standpoint, these results raise the question of whose interests the OCI rules are intended to serve. While the government does have an interest in "fair competition" and generally in the "integrity" of the procurement system, there is a distinct government interest in receiving the benefit of contractor performance free of self-interest and the importance of that principle should be recognized and elevated in the final FAR rule. To do so is consistent with full and fair competition and certainly would enhance public trust in the integrity of the acquisition system.*
In the past five years, a high percentage (41 percent) of OCI decisions involved Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. However, the sustain rate for this contracting vehicle (22 percent) was only slightly greater than the sustain rate represented by all OCI decisions.	*The growth of ID/IQ contracts and similar contracting vehicles unavoidably presents complexities in the application of OCI rules. However, a sizable fraction of federal procurement spending is channeled through ID/IQ contracts. Analytically, there appears to be no basis for OCI rules to apply less rigorously to ID/IQ contracts than to other procurement vehicles.*
Small business brought many OCI protests (nearly 40 percent over the 10-year period) but these protests were rarely successful in light of the very low sustain rate (6 percent).	*This is troubling in that small businesses may be the companies most likely to be excluded where OCI rules are "bent" or misapplied to permit award to larger firms. No special rules should apply to OCI in situations involving eligible small businesses, but the final rules should be sufficiently clear to respect if not advance the policy interest in promoting fair opportunity for small business.*

What Is Here Presented. Much has been written about OCIs and the subject is oft-discussed, if not the source of anxiety, in the federal procurement community. As we contemplate what the FAR Council may produce, it would be useful to look backward to the record or decisions by the GAO[1] on bid protests brought on OCI grounds. This is especially important because the ''law'' of OCIs, as applied, largely is the product of GAO decisions, beginning with *Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs.*, B-254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129. The principles as stated by FAR Subpart 9.5 have mostly been developed through GAO decisions; indeed, the proposed April DFARS rule explicitly was intended to codify the results of bid protest decisions. *See* 75 Fed. Reg. 20954 (''[t]he many decision issued in the past 15 years by the Government Accountability Office (GAO) and the Court of Federal Claims (COFC) on OCIs should be reflected in any updated [DFARS] coverage.''

Methodology Employed. We have collected and analyzed, at a high level, metrics of decisions as would indicate trends or patterns. Basic information included the number of OCI cases decided, each year, the number of OCI protests sustained, and the distribution of OCI protests between DOD and its components, on the one hand, and civilian agencies, on the other. Also summarized are the ground asserted in decided protests, using the three ''types'' of OCI first identified in the referenced *Aetna* decision, i.e., ''impaired objectivity,'' ''biased ground rules'' and ''unequal access to information.'' Concern has been expressed, in recent OCI dialogue, about the workload and responsibilities of contracting officers, and how the role of the CO has been affected by OCI protests. We looked at the outcome of OCI cases to determine where CO actions were sustained, rejected or not discussed. OCI is not defined by the DFARS, but there has emerged through cases distinctions between OCI that is ''actual,'' ''potential'' or ''apparent.''[2] Another category where data was collected concerned the disposition of OCI Mitigation Plans where these figured in the decisions.

In addition, we looked at the cases to see whether the solicitations at issue imposed special process or substantive requirements beyond the general application of FAR Subpart 9.5. (There were relatively few examples.) Also, we considered whose interest was primarily served by the grounds asserted in an OCI protest, i.e., distinguishing among three grounds – ''Integrity'' (where the policy objective is to protect the integrity of the procurement process); ''Protect Fair Competition'' (where the objective is to avoid compromise to fair competitive opportunity by reason of OCI) and ''Assure Government of Disinterested Performance'' (where the purpose is to protect the Government's interest in receiving contractor performance that is free from impairment or effects which reflect a contractor's self-interest).[3]

Our analysis also looks at the number of cases decided under ordering agreements such as ID/IQ awards, recognizing the growth in the frequency and value of such contracting vehicles in recent years. Finally, we also examine the number of decisions on OCI protests brought by small businesses.

Initially, we hypothesized that we would see a pattern of decisions demonstrating a downward trend of sustained OCI protests due to greater experience with the issue on the part of purchasing agencies and in reflection of CO's becoming more aware and being careful about addressing ''actual,'' ''potential,'' and ''apparent'' OCI's. No downward trend, however, is apparent from the decisions. We also anticipated that a recurring feature of decisions rejecting OCI claims would be where the CO identified the OCI, documented it, and took reasonable steps to mitigate, avoid, or eliminate it. This latter assumption proved correct.

Detailed Results.

1. *How Frequently Are OCI Cases Decided? Is There an Upward Trend?*

Between 2001 – 2005, a total of **23** OCI cases were decided by the GAO. The corresponding number between 2006 and 2011 (YTD) is **45**. For the entire period, between 2001 – 2011 (YTD), **68** OCI cases were decided. (One OCI case has been decided thus far in 2011.)

For the entire period of ten years, an average of **6.7** OCI cases was decided annually. An average of **4.6** OCI cases was decided annually between 2001 – 2005 while **9.0** were decided annually between 2006 – 2010. Thus, the rate of decided OCI cases has nearly doubled in the past five years. Presumably, the rate of protests raising OCI issues also is greater in the past five years.[4]

While there were many more OCI cases decided in the last half of the prior decade than in the first half, the

[1] The present study addressed 10 years of GAO decisions on OCI cases, from the period 2001 – 2010. One OCI case has been decided in 2011; it also is included in the study. We anticipate continuing this analysis to include GAO cases from the period between 1995 (the year in which *Aetna* was decided) and 2000, so that all decisions since *Aetna* are encompassed. A further iteration will address OCI cases of the Court of Federal Claims and of the Court of Appeals for the Federal Circuit. Accordingly, the results of the present analysis should be regarded as provisional and subject to change. No claim is made as to the statistical validity of the results here presented.

[2] For purposes of analysis: an ''actual'' OCI exists where the contractor's performance of the contemplated work gives rise to one or more present OCIs that require resolution; a ''potential'' OCI exists where the contractor's performance of the contemplated work may give rise to one or more OCIs; and an ''apparent'' OCI exists where it appears to the public that the contractor's performance on the contract will give rise to an OCI regardless of whether an actual or potential OCI exists

[3] These are not precise definitions – but, at present, FAR Subpart 9.5 contains neither a statement of ''policy'' or ''purpose'' but instead operates by citing a limited number of examples illustrating situations to be avoided. We see there first category (''Integrity'') as looking broadly to the *public* interest that OCI not cause offense to the public trust or taint the confidence of the public that its funds are being well and fairly spent. The second category (''Fair Competition'') focuses on the particular and primary interest of participating vendors that an OCI not confer to a rival an unfair or unearned advantage in competition. The third category (''Disinterested Performance'') recognizes that, apart from the purposes of the general public, and of bidders, there is a distinct interest of the *Government* in getting ''its money's worth'' on acquisitions in the form of supplies or services reflecting what are in the Government's best interests, versus what may be in the self-interest of the vendor.

[4] Our analysis addresses only GAO decisions. Not known is the number of OCI cases filed at the GAO or dispositions short of those decisions. Data on the grounds asserted in filed protests is not available to the public. The GAO presumably has access to such data and could generate a study which shows the disposition and characterization of filed protests.

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number of annual decisions in the past five years exhibits no clear trend. Between 2007 and 2010, OCI decisions ranged from a low of 5 to a high of 13.

2. *Who Brought OCI Cases? Were Most Brought by Bidders Objecting to an Award?*

Of the 68 cases decided from 2001 – 2011 (YTD), **93 percent** were brought by persons objecting to an award decision. Only **7 percent** of the cases were brought by persons who were objecting to having been excluded from a competition by reason of OCI.

3. *Were Most of the Decided OCI Cases Against DOD?*

Consistently over the past ten years, nearly three-quarters of decided OCI protests were brought against DOD and its components (including, here, the CIA). For each of the periods, 2001 2005, and 2006 – 2011, the identical percentage – **71 percent** — of OCI decisions were on cases brought against DOD and its components.

4. *What Was the Sustain Rate? Were More Cases Sustained Against DOD Than Civilian Agencies? How Does the Sustain Rate on OCI Compare with Other Protests?*

Over the whole 10-year period, the sustain rate for all decided OCI protests was **19 percent**. For the years 2001- 2005, the sustain rate was **17 percent**. For the last half of the decade, between 2006 – 2010 (including 2011 YTD), the sustain rate was **20 percent** — only slightly higher than for the 2001 – 2005.

Over the whole period, the sustain rate against DOD components (**19 percent**) is essentially the same as the sustain rate against civilian agencies (**20 percent**).

Only one OCI case was sustained against civilian agencies between 2001 – 2005. Between 2006 – 2010, OCI cases against civilian agencies were sustained at the rate of **23 percent**, somewhat higher than the sustain rate of **19 percent** against DOD components over the same period.

In cases decided against DOD, the sustain rate between 2001 – 2005 (**19 percent**) was unchanged between 2006 – 2011, as the sustain rate for the latter period (**19 percent)**.

The *overall* sustain rate (**20 percent**) on OCI protests for the more recent period, 2006 – 2011 (YTD) actually is somewhat *less* than the sustain rate reported by the GAO over the comparable period for all protests. The GAO by letter dated November 23, 2010, advised the Congress that protests sustained during the period inclusive of FY 2006 – FY 2010 varied from a low of **18 percent** to a high of **29 percent.** From that document, it can be stated that the sustain rate for the most recent five-year period was **22 percent** on cases decided on the merits. When the sample is adjusted to remove decided cases where brought by small business, however, the sustain rate on OCI protests, between 2006 – 2011 (YTD), was 30 percent, higher than the sustain rate GAO has reported to Congress for all protests (including those filed by small business) over the same period**.**

5. *What Grounds Were Asserted Most Frequently in OCI Decisions?*

Protesting parties asserted ''Impaired Objectivity'' in **54 percent** of the cases decided on the merits, over the 10-year period. ''Biased Ground Rules'' were asserted in **28 percent** and ''Unequal Access to Information'' was at issue in **37 percent** of the decided protests over this period.

6. *How Frequently Did the GAO Sustain or Reject the CO's Actions?*

Over the ten-year period, in approximately one-third of the decisions (**37 percent**), there was no discussion of the CO's action. Where there was a discussion, GAO generally has been inclined to uphold CO discretion and authority. Where considered, the CO's action was upheld in the great majority (**71 percent)** of decisions (**32** sustained versus **13** rejected), a ratio of approximately **2.46:1**.

7. *Did More GAO Decisions Concern ''Actual'' or ''Potential'' OCI?*

In OCI protests decided on the merits, over the ten years, ''potential'' OCI (forward looking) was the principally asserted ground in nearly three-quarter (**71 percent**) of the decisions, versus ''actual'' OCI in **19 percent** and ''apparent'' OCI in just **9 percent**.

8. *How Often Was an OCI Mitigation Plan At Issue? How Did the GAO Treat Mitigation Plans?*

The adequacy or infirmity of a mitigation plan figured in only 22 of 68 decisions (**32 percent**) between 2001 - 20011. Where a mitigation plan was ''at issue,'' it rejected in **59 percent** of the decisions (13 of 22).

9. *How Many Cases Involved ''Special'' OCI Process Or Procedure?*

Only in 12 of the 45 OCI cases (**27 percent)** decided from 2006 through 2011 (YTD) did the procuring agency employ in the acquisition a ''special'' OCI process (e.g., qualification followed by bidding for OCI-eligible firms).

10. *What ''Principle Purposes'' Were Served by GAO OCI Decisions?*

Between 2001 – 2011 (YTD), in more than half (**56 percent**) of the decisions, the principal OCI concern at issue was the objective to ''Protect Fair Competition.'' The corresponding percentage for the years 2006 – 2011 (YTD) is **57 percent.**

Also for the 10-year period, the ''Integrity'' of the procurement system was the principal objective in nearly one-quarter (**23 percent**) of the decisions. For the years 2006-2011 (YTD), the corresponding percentage is **26 percent.**

In **23 percent** of the decisions between 2001 – 2011 (YTD), the emphasis on the Government's interest in OCI rules as a means to assure it would receive ''Disinterested Contractor Performance.'' For the years 2006 – 2011 (YTD), the corresponding percentage is **17 percent**.[5]

11. *To What Extent Were OCI Decisions Made on ID/IQ Contracts?*

ID/IQ contracts represented **41 percent** of the OCI decisions between 2006 – 2011 (YTD). There is some indication of an increase in ID/IQ OCI decisions since Congress expanded the GAO's jurisdiction over task order protests in 2008. The sustain rate (**22 percent**) on ID/IQ OCI decisions since 2006 is slightly greater than for OCI decisions made on other types of procurements.

12. *How did Small Business Figure in OCI Decisions?*

Small business filings represented a disproportionate share (**39 percent**) of the decided OCI protests, between 2001 – 2011 (YTD) — but the sustain rate for small busi-

[5] The emphasis on protection of ''fair competition'' reflects the condition that OCI cases are brought via protest to serve the business interests of particular suppliers. The predominance of this issue may not fully reflect the distinct interests which the Government seeks to protect via OCI regulations.

nesses (**8 percent**) is very low. Between 2001 and 2005, small business filings accounted for **35 percent** of the decisions but only one small business OCI protest was sustained, a sustain rate of **13 percent**. Between 2006 and 2011 (YTD), small business filings accounted for **40 percent** of OCI decisions but the sustain rate was just **6 percent.**

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