

Getting the Job Done: Meaningfully Investigating Organizational Conflicts of Interest

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You keep going on, but, I mean, the number of pages does not equate to the quality of the review. If that were true then, you know, you could then basically pull out pages of the phone book, staple them together with prose in the front and the back.

... *It's 17 pages. It's nicely typed. You know, it's got headings and tabs and things like that, but I don't know whether it does the job or not.*¹

I. Introduction

Above are the comments Judge Susan G. Braden of the Court of Federal Claims (COFC) made during oral argument regarding the government's Organizational Conflict of Interest (OCI) analysis. In her decision, she concluded that the analysis of the contracting officer (KO) did not get the job done:² the KO failed to conduct an adequate investigation into potential OCIs. As the COFC stated in another case:

The process of identifying and mitigating a conflict is not a bureaucratic drill, in which form is elevated over substance, and reality is disregarded. Nor is it a check-the-box exercise, in which the end result . . . is all but preordained. Rather, as will be seen, the [Federal Acquisition Regulation] calls upon the [KO] to conduct a timely and serious review of the facts presented.³

This article provides a practical outline for getting the job done by conducting a "timely and serious review" of potential OCIs consistent with the Federal Acquisition Regulation (FAR) for every acquisition.⁴ The job of investigating potential OCIs is not complicated. It consists only of identifying, evaluating, and documenting potential OCIs. Although not complicated, if not done correctly, the

agency risks both a successful protest⁵ and the accompanying procurement delays.

The focus of this article is on investigating potential OCIs. It does not discuss the KO's related responsibility to avoid, neutralize, or mitigate OCIs,⁶ nor does it discuss the process for waiving OCIs.⁷ Nevertheless, a meaningful OCI investigation is an essential precondition to both.

Before outlining the investigation process, it is critical to understand what an OCI is. To that end, Part II of this article provides a background on the three general types of OCIs, who is affected by OCIs, and how OCIs relate to other conflicts of interest.

With that background in place, Part III of this article outlines the OCI investigation process, starting with the KO's role. Along with the KO's role is a discussion of the KO's discretion throughout the process and the resources

⁵ A protest is:

a written objection by an interested party to any of the following:

- (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
- (2) The cancellation of the solicitation or other request.
- (3) An award or proposed award of the contract.
- (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Id. 33.101.

⁶ See *id.* 9.504(a)(2) (charging the KO to avoid, neutralize, and mitigate prior to contract award); see generally Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 PUB. CONT. L.J. 639 (Summer 2006) (discussing various mitigation strategies in dealing with OCIs).

⁷ Federal Acquisition Regulation (FAR) 9.503 allows the agency head to waive the application of the FAR OCI rules in particular instances when it is not in the government's interest to apply them. The waiver does not create an exception to the OCI rules, but only waives their application in a single procurement. See *AT&T Government Solutions, Inc.*, B-407720, Jan. 30, 2013, 2013 CPD ¶ 45 (dismissing protest alleging an OCI as academic where the agency waived any OCI just days before the Government Accountability Office (GAO) protest decision was due); Sarah M. McWilliams, *Refining the Art of Compromise: Organizational Conflict of Interest Waivers Under FAR Sections 9.503 and 9.504(e)*, CONT. MGMT. Apr. 2008 (discussing "the advantages of OCI waivers, the applicable legal and regulatory requirements, and practical strategies for crafting waivers to achieve compliance and withstand challenge").

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¹ *Axiom Res. Mgmt., Inc. v. United States*, 78 Fed. Cl. 576, 594, 598 (Fed. Cl. 2007) (quoting the judge's comments made during oral argument about the government's Organizational Conflict of Interest (OCI) analysis).

² *Id.* at 600 ("After reviewing the Administrative Record, the briefs, and convening an oral argument, the court has determined that the [contracting officer (KO)] abused his discretion in violation of FAR § 9.5 by awarding the Task Order . . .").

³ *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 519 (Fed. Cl. 2011) *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012).

⁴ FAR 9.5 (2012) [hereinafter FAR] (providing guidance on OCIs).

available to the KO. It then details the OCI investigation process, which includes identifying, evaluating, and documenting potential OCIs. Part III concludes with several practical considerations to remember throughout the investigation.

At the end of this article, it will be clear that the job of investigating potential OCIs can be done and must be done. It will also be clear that, although the FAR places the responsibility for investigating OCIs on the KO, the KO's legal advisor plays a critical role in ensuring that the investigation and findings are sufficient and can be defended during subsequent protest litigation. Meaningfully investigating potential OCIs will enable the KO to fulfill her mandate to "avoid, neutralize, and mitigate" potential OCIs.⁸

II. OCI Background

A. Types of OCIs

As contractors consolidate and provide more services to the government, there is greater risk that contractor performance will be tainted by conflicts of interest, in particular OCIs.⁹ Under the FAR, an OCI occurs when "because of other activities or relationships with other persons, 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."¹⁰ Within that definition, the term "person" is broadly read to include both individuals and organizations.¹¹ OCIs must be distinguished from personal conflicts of interest.¹² Federal Acquisition Regulation subpart 9.5 (Organizational and Consultant Conflicts of Interest) supplements the definition of "person" and provides specific guidance on OCIs.

The FAR provides underlying principles, general rules, and examples to help the KO identify and evaluate potential OCIs. The two underlying principles are "preventing the existence of conflicting roles that might bias a contractor's judgment" and "preventing unfair competitive advantage."¹³ From these underlying principles, the FAR distills general rules stating, with some exceptions, that OCIs exist where a

contractor performs systems engineering or technical direction work (e.g., resolving interface problems or technical controversies); where a contractor prepares specifications or work statements; where a contractor provides evaluation services; and where a contractor has access to proprietary information.¹⁴ The FAR illustrates the general rules with nine simple examples.¹⁵

The drafters of the FAR recognize that the provided examples are not all-inclusive, but are offered to help the KO apply the general rules.¹⁶ Likewise, the FAR advises KOs that each "individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract."¹⁷ This guidance is problematic because it is both fragmentary and incongruous.¹⁸

Apparently recognizing that the general rules and examples do not cover every situation, the Government Accountability Office (GAO) and the courts¹⁹ divide OCIs into three types: biased ground rules, impaired objectivity, and unequal access to information.²⁰ While a potential conflict may not fit squarely into one of the three types,

¹⁴ *Id.* 9.505-1, 2, 3, 4.

¹⁵ *Id.* 9.508. Example A provides:

Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (i.e., turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (e.g., fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

Id.

¹⁶ *Id.* 9.508.

¹⁷ *Id.* 9.505.

¹⁸ Ralph C. Nash, *Organizational Conflicts of Interest: An Increasing Problem*, 20 No. 5 NASH & CIBINIC REP. ¶ 24, May 2006 (stating that the FAR OCI guidance is "inadequate" because it is "fragmentary—containing general rules, specific rules, and examples" and difficult for the KO to decipher "because the segments seem to address different situations with little correlation").

¹⁹ The GAO and the Court of Federal Claims (COFC) have concurrent jurisdiction over bid protests. The Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-7 (2013), is the source of the GAO's jurisdiction and the Tucker Act, 28 U.S.C. § 1491 (2013), gives the COFC jurisdiction. Federal district court jurisdiction over bid protests terminated on January 1, 2001. *Baltimore Gas & Elec. Co. v. United States*, 290 F.3d 734, 737 (4th Cir. 2002).

²⁰ STEVEN W. FELDMAN, *GOVERNMENT CONTRACT GUIDEBOOK* § 3:35 (4th ed. 2012). *See, e.g.*, *Aetna Gov't Health Plans, Inc.*, B-254397.15, 95-2 CPD ¶ 129 (Comp. Gen. July 27, 1995); *Axiom Res. Mgmt., Inc. v. United States*, 78 Fed. Cl. 576, 592 (Fed. Cl. 2007) (stating that the FAR requires KOs to identify and mitigate unequal access to information, impaired objectivity, and biased ground rules OCIs).

⁸ FAR, *supra* note 4, 9.504(a)(2).

⁹ Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 26-27 (2005).

¹⁰ FAR, *supra* note 4, 2.101.

¹¹ Gordon, *supra* note 9, at 31 ("We have to presume that the FAR is using the word 'person' in the legal sense, which would include treating a company or other organization as a 'person.'").

¹² *See* discussion *infra* Part II.C.

¹³ FAR, *supra* note 4, 9.505.

categorization provides a useful construct for identifying and evaluating potential OCIs in a way that will be familiar to the reviewing authority. Each type is described below.

1. Biased Ground Rules OCIs

A biased ground rules OCI occurs when “a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing a statement of work or the specifications.”²¹ The conflict occurs because a firm may, intentionally or not, set ground rules that cater to its abilities, to the prejudice of other potential offerors. A biased ground rules OCI consists of two elements: first, the contractor occupies a position of influence based on its performance of a government contract;²² second, the position of influence relates to a future procurement.²³

The FAR addresses biased ground rules OCIs with the two general rules found in FAR 9.505-1 (Providing Systems Engineering and Technical Direction) and 9.505-2 (Preparing Specifications or Work Statements).²⁴ In addition, most of the examples provided in FAR 9.508 are of biased ground rules OCIs. The general rule found in FAR 9.505-1 forbids contractors who provided systems engineering or technical direction on a system from receiving a contract or acting as a subcontractor on a contract to supply the system or any of its major components.²⁵ The reason for this prohibition is that the

contractor providing these activities “occupies a highly influential and responsible position in determining a system’s basic concepts and supervising their execution,” which places it in a position to favor its own products or capabilities.²⁶ There is no exception to this prohibition; however, because both systems engineering and technical direction are defined as including a “combination of substantially all of the activities” listed in FAR 9.505-1, the KO has some discretion in determining whether the work done by the contractor is either systems engineering or technical direction where it includes only some of the activities listed.²⁷

The general rule found in FAR 9.505-2 forbids a contractor from receiving a contract award where it prepared specifications or work statements used in the procurement.²⁸ The FAR does provide limited exceptions for development and design contractors or situations where multiple contractors are involved in drafting the specifications or work statement.²⁹ Despite the exceptions, the KO must be careful when evaluating a potential OCI where the contractor had any role in the drafting of the specifications or work statement.

²¹ *Aetna*, 95-2 CPD ¶ 129, at 8.

²² See, e.g., *Valor Constr. Mgmt., Inc.*, B-405306, Oct. 17, 2011, 2011 CPD ¶ 221, at 5 (finding that because awardee’s input into the Request For Proposals (RFP) was “limited to identifying safety deficiencies and general approaches to remedying them” and that it “furnished no advice or recommendations regarding the scope of the work to be performed or the manner in which it was to be performed” there was no biased ground rules OCI); compare with *Energy Sys. Grp.*, B-402324, Feb. 26, 2010, 2010 CPD ¶ 73, at 6 (finding KO’s determination that an OCI existed reasonable because, in part, the feasibility study done by the protestor “provided recommendations as to which energy conservation projects should be performed and the technical solutions that should be used, and prepared cost estimates”).

²³ *QinetiQ N. Am., Inc.*, B-405008, July 27, 2011, 2011 CPD ¶ 154, at 8 (finding that “because the record does not reflect hard facts to show that [awardee]’s work under the predecessor contract put the firm in a position to materially affect the protested procurement . . . protest that [awardee]’s prior work created a potential or actual biased ground rules OCI is denied.”); *Philadelphia Produce Mkt. Wholesalers, LLC*, B-298751.5, May 1, 2007, 2007 CPD ¶ 87, at 2 (finding no OCI where awardee’s “performance of essentially the same work at other [locations] served as the basis for the current RFP’s performance requirements”).

²⁴ *Aetna*, 95-2 CPD ¶ 129, at 8.

²⁵ FAR, *supra* note 4, 9.505-1.

A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not—(1) Be awarded a

contract to supply the system or any of its major components; or (2) Be a subcontractor or consultant to a supplier of the system or any of its major components. . . . Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors’ operations, and resolving technical controversies.

Id.

²⁶ *Id.*

²⁷ See, e.g., *QinetiQ*, 2011 CPD ¶ 154, at 8-9 (denying the protest where the KO’s determination that the awardee’s prior work did not constitute technical direction).

²⁸ FAR, *supra* note 4, 9.505-2. The rule has separate provisions applicable to contracts for goods and contracts for services. For goods contracts the general rule is that unless an exception applies where

a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract.

Likewise, for service contracts where “a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless [an exception applies].” *Id.*

²⁹ *Id.*

2. Impaired Objectivity OCIs

An impaired objectivity OCI occurs where “a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals.”³⁰ The two elements of an impaired objectivity OCI are, first, that a contractor is currently performing on a contract and, second, that performance could affect the award or performance of a second contract.

For a finding that current performance could affect a second contract, the contractor must exercise some judgment in the performance of the contract.³¹ As an example, the third general rule found in FAR § 9.505-3 (Providing Evaluation Services) covers a subset of impaired objectivity OCIs by prohibiting contractors from being awarded contracts where a contractor will evaluate its own offers or those of a competitor, unless proper safeguards are in place. The concern with this type of OCI is the firm’s ability to provide the government with impartial advice.

3. Unequal Access to Information OCIs

Unequal access to information OCIs arise where “a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract.”³² The concerns here are that the firm with nonpublic information will have an unfair competitive advantage and that the government is perceived as the source of the advantage.

There are essentially three elements of an unequal access to information OCI. First, a contractor must have access to nonpublic information. If the relevant information has been published or otherwise provided to potential offerors, it is no longer nonpublic.³³ Second, the contractor receives the information as a result of its performance of a government contract. If the contractor receives the information some other way, for example, from a former employee of the competitor, there is no OCI.³⁴ Finally, the

information must provide not just a competitive advantage, but an unfair competitive advantage. Thus, where the information possessed by the contractor is outdated or not relevant to the current procurement, no unfair competitive advantage exists.³⁵ Generally, the informational advantage enjoyed by an incumbent does not create an unfair competitive advantage.³⁶

One significant area of concern within this category of OCIs is the “revolving door” through which employees transition between the government and private sectors.³⁷ When employees leave government service, in many cases, they take with them procurement-sensitive information. This information may include government information, such as independent government cost estimates or source selection plans. It may also include contractor information where the former employee oversaw contract performance. In either case, the potential exists for an OCI when the former employee goes to work or consults for a government contractor.³⁸

B. To Whom Does a Conflict Attach?

In addition to understanding what an OCI is, it is important to understand who can be affected by an OCI.

that it was a “private dispute between private parties that we will not consider absent evidence of Government involvement”).

³⁵ Gen. Dynamics C4 Sys., Inc., B-407069, Nov. 1, 2012, 2012 CPD ¶ 300, at 8 (denying protest where KO determined, in part, that the information was “too remote” to be useful); McKissack-URS Partners, JV, Comp. Gen. B-406489.7, 2013 CPD ¶ 25, at 5 (Jan. 9, 2013) (finding the KO’s determination that the information was stale and not competitively useful where it was more than three years old, bore little resemblance to information submitted with protestor’s proposal, and did not contain pricing information).

³⁶ See, e.g., ARINC Eng’g Servs., LLC v. United States, 77 Fed. Cl. 196, 203 (Fed. Cl. 2007) (citing Snell Enters., Inc., B-290113, June 10, 2002, 2002 CPD ¶ 115 (Comp. Gen. June 10, 2002) for the proposition that “[t]he mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential offeror’s prior performance of a particular requirement”); Onsite Health Inc., B-408032, May 30, 2013, 2013 CPD ¶ 138, at 8 (“[I]t is well settled that an offeror may possess unique information . . . due to its prior experience under a government contract, including performance as the incumbent contractor. Our Office has held that the government is not required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action.”).

³⁷ See generally Stuart B. Nibley, *Jamming the Revolving Door, Making It More Efficient, or Simply Making It Spin Faster: How Is the Federal Acquisition Community Reacting to the Darleen Druyun and Other Recent Ethics Scandals?*, 41 PROCUREMENT LAW. NO. 4, at 1 (Summer 2006) (providing examples of potential OCIs created when government employees transition to the private sector).

³⁸ See, e.g., TeleCommunications Sys., Inc., Comp. Gen. B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 (finding an OCI where awardee had hired a former high-level agency employee).

³⁰ Aetna Gov’t Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129, at 9.

³¹ Nash, *supra* note 18 (“There will be no OCI if the contract does not call for the application of judgment by the contractor.”).

³² Aetna, 95-2 CPD ¶ 129, at 8.

³³ KPMG Peat Marwick, 73 Comp. Gen. 15, 93-2 CPD ¶ 272 (finding unreasonable the agency’s exclusion of offeror because the information received from the agency was in response to a Freedom of Information Act (FOIA) request).

³⁴ The GEO Grp., Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153, at 4 (holding that no OCI existed where GEO’s Vice President provided GEO proprietary information to awardee during the proposal process by stating

While the OCI examples in the FAR discuss OCIs in terms of a single contractor or a single company, the GAO has found that “there is no basis to distinguish between a firm and its affiliates.”³⁹ Thus, “where a subcontractor’s knowledge or interests create an unfair competitive advantage, that advantage is generally imputed to the prime contractor.”⁴⁰ The analysis centers on whether the interests of the prime contractor are “effectively aligned” with those of a subcontractor or other firm such that the conflict should be imputed to the prime contractor.⁴¹ The touchstone for imputing an OCI to another firm is whether there is a financial relationship between the firms or a direct financial benefit to the firm alleged to have an OCI.⁴²

Secondary relationships can be problematic as well. For example, in *McTech Corporation*, the GAO recently upheld a KO’s decision to exclude McTech from the competition based on a relationship of its protégé⁴³ to another entity. McTech intended to compete for a contract to construct dormitories and a conference center at the Department of Homeland Security Training Center in Harpers Ferry, West Virginia. Previous design work for the construction project was done by BrooAlexa Design Joint Venture LLC. Following an anonymous phone call alleging that McTech was closely linked to the project designer, the KO conducted an investigation. The KO found during the investigation that McTech had a Small Business Administration-approved mentor-protégé relationship and six ongoing joint ventures with BrooAlexa LLC. The KO also found that BrooAlexa LLC was the managing member of BrooAlexa Design Joint Venture. Despite McTech’s claim that it did not have a joint venture or other contractual interest with BrooAlexa Design Joint Venture LLC, the GAO found the KO’s conclusion that McTech and BrooAlexa Design Joint Venture were affiliated to be reasonable.⁴⁴

³⁹ Aetna Gov’t Health Plans, Inc., Comp. Gen. B-254397.15, July 27, 1995, 95-2 CPD ¶ 129, at 9.

⁴⁰ Superlative Techs., Inc., Comp. Gen. B-310489, Jan. 4, 2008, 2008 CPD ¶ 12 at 4 n.16.

⁴¹ See *Valor Constr. Mgmt., LLC*, Comp. Gen. B-405306, Oct. 17, 2011, 2011 CPD ¶ 221, at 4 (finding reasonable the KO’s determination that two firms’ interests were not effectively aligned where their relationship “reflected the ordinary relationship between a prime and subcontractor in performance of a single contract”).

⁴² See, e.g., *AdvanceMed Corp.*, Comp. Gen. B-404910.4, Jan. 17, 2012, 2012 CPD ¶ 25, at 9 (stating that GAO looks for “some indication that there is a direct financial benefit to the firm alleged to have the OCI”); *Marinette Marine Corp.*, Comp. Gen. B-400697, Jan. 12, 2009, 2009 CPD ¶ 16, at 24 (finding the lack of “any financial relationship” between the firms made the potential OCI speculative and remote).

⁴³ The Small Business Administration (SBA) administers the Mentor-Protégé Program, which allows established firms to mentor smaller ones with the goal of helping SBA 8(a) participants compete more successfully for federal government contracts. See generally *Mentor-Protégé Program*, SBA.GOV, <http://www.sba.gov/content/mentor-prot%C3%A9g%C3%A9-program> (last visited Nov. 20, 2013).

⁴⁴ *McTech Corp.*, Comp. Gen. B-406100, Feb. 8, 2012, 2012 CPD ¶ 97.

C. The Relationship of OCIs to Other Potential Conflicts

The FAR provides that government business “shall be conducted in a manner above reproach” and that the “general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.”⁴⁵ Thus, OCIs are just one type of conflict that may arise during the procurement process.⁴⁶ Other potential conflicts include Procurement Integrity Act (PIA) violations, antitrust violations, and contracts with government employees.⁴⁷ It is possible that the facts of a particular procurement will create a situation where multiple conflicts may exist (e.g., both a PIA violation and an OCI). Nevertheless, the KO must be careful to distinguish between potential conflicts while recognizing that the existence of one does not necessarily substantiate the other.

In evaluating potential conflicts, the KO must determine which party has the conflict; that is, whether the organization is conflicted or whether a person is conflicted. As the GAO has stated, “there is a distinction between an OCI and a personal conflict of interest: with an OCI, the conflicted party is the organization; with a personal conflict of interest, the conflict is with the individual.”⁴⁸

III. Investigating Potential OCIs

With an understanding of the scope of OCIs, this section focuses on how potential OCIs are investigated. This part first discusses the broad discretion afforded KOs before presenting a step-by-step process for conducting OCI investigations, and concludes with some practical considerations applicable throughout the investigation process.

A. Contracting Officer Discretion

The FAR places the burden of identifying and evaluating potential conflicts of interest squarely on the

⁴⁵ FAR, *supra* note 4, 3.101-1.

⁴⁶ Gordon, *supra* note 9, at 28 (stating that “OCIs are a subset of conflicts of interest”).

⁴⁷ FAR Part 3 discusses improper business practices and personal conflicts of interest, including Procurement Integrity Act violations (FAR 3.104 (2012)), antitrust violations (FAR Subpart 3.3 (2012)), contracts with government employees (FAR Subpart 3.6 (2012)), and personal conflicts of interest (FAR Subpart 3.11 (2012)).

⁴⁸ *Savannah River Alliance, LLC*, Comp. Gen. B-311126, Apr. 25, 2008, 2008 CPD ¶ 88, at 17 (finding that, at most, the conflicts alleged by the disappointed offeror give rise to personal conflicts of interest but not OCIs where the awardee’s director had owned a consulting business and key personnel will remain employees of team members and not become employees of the prime contractor).

shoulders of the KO.⁴⁹ At the same time, the guidance it provides KOs is scant, charging KOs to examine each contracting situation “on the basis of its particular facts and the nature of the proposed contract,” based on the underlying principles of preventing bias in the contractor’s judgment and preventing unfair competitive advantages.”⁵⁰ Given this vague charge, it is not surprising that the FAR advises KOs to exercise “common sense, good judgment, and sound discretion” when investigating OCIs.⁵¹

1. Standard of Review

Fortunately, the GAO and the courts recognize that the FAR gives KOs significant discretion.⁵² The Federal Circuit recognized that “the [KO] enjoys great latitude in handling OCIs.”⁵³ As a result of this latitude, the KO’s decision is given deference by the GAO and the courts. Both the GAO and the courts apply the “arbitrary and capricious” standard of review under the Administrative Procedures Act⁵⁴ when reviewing the KO’s decision.⁵⁵ Under this standard, an agency’s action is arbitrary and capricious if 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 is so implausible that it could not be ascribed to a difference in

view or the product of agency expertise.”⁵⁶

Under this standard of review, there are generally two situations where the KO’s exercise of discretion will be questioned. First, the KO’s decision will be questioned where she fails to identify a potential OCI (i.e., “entirely failed to consider an important aspect of the problem”).⁵⁷ Second, the KO’s decision will be questioned when her conclusions regarding the OCI do not reasonably follow from the evidence.⁵⁸ To maximize the deference that her decision will receive from either the GAO or court, the KO must both identify and reasonably evaluate potential OCIs.

2. Hard Facts Requirement

While the KO has considerable discretion, the KO must identify hard facts to support her conclusion that an OCI exists. Although the hard facts requirement is not new,⁵⁹ beginning with *Turner Construction Co., Inc. v. United States*,⁶⁰ the courts and GAO have given it renewed attention. Among the issues in *Turner* was whether the Court of Federal Claims misapplied the “hard facts” requirement.⁶¹ The Federal Circuit held that the COFC correctly applied the hard facts requirement, stating that a KO’s OCI finding cannot rely on “inferences based upon

⁴⁹ FAR, *supra* note 4, 9.504(a)(1) (stating that KOs shall analyze planned acquisitions to “[i]dentify and evaluate potential conflicts of interest . . .”).

⁵⁰ *Id.* 9.505. See also Ralph C. Nash & John Cibinic, *Conflicts of Interest: The Guidance in the FAR*, 15 NO. 1 NASH & CIBINIC REP. ¶ 5, Jan. 2001 (stating that in the absence of specific guidance in the FAR, “[b]asically, COs are left to figure it out for themselves”).

⁵¹ FAR, *supra* note 4, 9.505.

⁵² See Richard J. Webber & Patrick R. Quigley, *Turner Construction Co., Inc. v. United States: Hard Facts and Contracting Officer Discretion*, 47 PROCUREMENT LAW. NO. 3, at 1 (Spring 2012).

⁵³ *Turner Constr., Inc. v. United States*, 645 F.3d 1377, 1384 (Fed. Cir. 2011) (affirming COFC decision finding GAO decision to be irrational where the GAO did not apply the proper deference to the KO’s OCI determination).

⁵⁴ 5 U.S.C. § 706 (2012) (stating that the “reviewing court shall . . . hold unlawful and set aside any agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. . .”).

⁵⁵ See *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 206 (Fed. Cl. 2011) (stating that “under the APA, a court determines, based on a review of the record, whether the agency’s decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); *QinetiQ North Am., Inc., Comp. Gen. B-405008*, July 27, 2011, 2011 CPD ¶ 154, at 6 (stating that the standard of review applied by GAO mirrors the arbitrary and capricious standard mandated by the Court of Appeals for the Federal Circuit); *but see* James J. McCullough, Michael J. Anstett & Brian M. Stanford, *Observations on the Federal Circuit’s Impact on Bid Protest Litigation Since ADRA*, 42 PUB. CONT. L.J. 91, 105 (2012) (observing that prior to *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009), the GAO did not apply the “arbitrary and capricious” standard under the APA).

⁵⁶ *Phoenix Mgmt., Inc. v. United States*, 107 Fed. Cl. 58 (Fed. Cl. Oct. 9, 2012) (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. 29 at 43 (2009)).

⁵⁷ See, e.g., *PCCP Constructors, JV, Comp. Gen. B-405036*, Aug. 4, 2011, 2011 CPD ¶ 156 (finding the KO’s investigation to be unreasonable where it limited its review to what responsibility and role the government employee had in the procurement prior to his retirement without any consideration of the employee’s access to non-public, source selection information); *L-3 Servs., Inc., Comp. Gen. B-400134.11*, Sept. 3, 2009, 2009 CPD ¶ 171, at 7 (finding that the “agency has yet to adequately investigate and reasonably determine the extent and type of information to which [awardee] had access or the efficacy of the non-disclosure agreement and mitigation plans, and absent the results of those inquiries, the record contains inadequate support for a finding that [awardee] did not have an unequal access to information organizational conflict of interest”).

⁵⁸ See, e.g., *Alion Sci. & Tech. Corp., Comp. Gen. B-297022.3*, Jan. 9, 2006, 2006 CPD ¶ 2, at 5 (finding the agency’s conclusion that “no known potential for conflict of interest exists” was unreasonable where awardee acknowledges certain situations where an OCI would be created and concluding that “the agency’s assessment of potential impaired-objectivity OCIs . . . is not adequately supported by the record”).

⁵⁹ Ralph C. Nash, *Preventing Unfair Competitive Advantage: The “Hard Facts” Requirement*, 26 NO. 6 NASH & CIBINIC REP. ¶ 32, June 2012 (“The ‘hard facts’ requirement was enunciated in *CACI, Inc.-Federal v. U.S.*, 719 F.2d 1567 (Fed. Cir. 1983), where the U.S. Court of Appeals for the Federal Circuit reversed a decision of the Claims Court that had enjoined an agency from awarding a contract to a company that had hired the head of the agency’s technical division to prepare its proposal and represent it in negotiations for the contract.”).

⁶⁰ 645 F.3d 1377 (Fed. Cir. 2011).

⁶¹ *Id.* at 1384.

suspicion and innuendo.”⁶²

The courts and the GAO, however, have not clearly defined what constitutes a hard fact. It is clear that a hard fact is less than absolute proof.⁶³ The GAO held that a KO may find “an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on hard facts, not mere innuendo or suspicion.”⁶⁴ For example, in the category of unequal access to information OCIs, the GAO has found that a showing of access to information, even without proof that the information was actually used, creates a presumption of an OCI.⁶⁵ Though without a clear definition, the KO should be careful and rely on facts that support only a single conclusion.⁶⁶

While there is no definition of hard facts, the courts and GAO have clarified that the burden is on the person asserting an OCI to establish hard facts supporting it.⁶⁷ In this way, there appears to be a presumption that an OCI does not exist where no hard facts exist to support the finding of an OCI. Even where a protest fails to proffer hard facts to support an OCI finding, however, the KO must ensure that her underlying investigation is reasonable.⁶⁸ In such cases, a

⁶² *Id.* at 1387 (internal quotations omitted). Specifically, the court upheld COFC’s finding that the “GAO cited no facts supporting its conclusion that [Turner’s design partner] had access to any information of competitive worth”, but merely relied on inferences when it found that some unnamed employees may have had access to unidentified information. *See generally* Webber & Quigley, *supra* note 52, at 3 (containing a thorough discussion of the *Turner* case from the GAO protests through the Court of Appeals for the Federal Circuit).

⁶³ *McTech Corp.*, Comp. Gen. B-406100, Feb. 8, 2012, 2012 CPD ¶ 97.

⁶⁴ *Id.* at 6. Because of this, some incorrectly distinguish “actual” from “apparent” OCIs; there is no such distinction. Gordon, *supra* note 9, at 40 (“The word ‘apparent’ can cause mischief, or at least confusion, in the context of OCIs. One hears reference to an ‘apparent OCI,’ which sounds like a contrast to an ‘actual OCI.’ It may be more appropriate, however, to say that OCIs are always a matter of appearance.”).

⁶⁵ *TeleCommunications Sys. Inc.*, Comp. Gen. B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229, at 3.

⁶⁶ *See, e.g.*, *VSE Corp.*, Comp. Gen. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, at 15 (finding the KO’s conclusion was not based on hard facts where the facts were ambiguous, showing only that the former government employee had access to the computer system but not that the system contained procurement-related files).

⁶⁷ *See, e.g.*, *Distributed Solutions, Inc. v. United States*, 104 Fed. Cl. 368, 390 (Fed. Cl. 2012) (stating that “no hard facts were tendered” by protester and thus no “relevant and viable OCI has been established”); *Diversified Collection Servs., Inc.*, Comp. Gen. B-406958.3, Jan. 8, 2013, 2013 CPD ¶ 23, at 4 (citing *Turner* for the proposition that “OCI determinations must be based on hard facts that indicate the existence or potential existence of a conflict. . . .”); *NikSoft Sys. Corp.*, Comp. Gen. B-406179, Feb. 29, 2012, 2012 CPD ¶ 104, at 4 (“An agency’s decision to exclude an offeror from a competition based on a conflict of interest arising from unequal access to information must be supported by ‘hard facts,’ that is, the agency must specifically identify competitively useful, non-public information to which the offeror had access.”).

⁶⁸ *See, e.g.*, *NetStar-1 Gov’t Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 521 (Fed. Cl. 2011) *aff’d*, 473 F. App’x 902 (Fed. Cir. 2012) (granting

KO should identify hard facts to refute assertions made in the protest and document her efforts to investigate the OCI.

3. OCI Team

In conducting the investigation and identifying the requisite hard facts, the KO should not rely solely upon her own knowledge of the acquisition or the law, but should assemble a team to assist her in the effort.⁶⁹ The FAR specifically advises KOs to seek legal counsel and advice from subject matter experts.⁷⁰ By surrounding herself with a team, the KO will maximize the deference that the GAO or court will afford her decision.⁷¹

The KO’s legal advisor is a key member of the investigation team. The FAR’s guidance on OCIs is limited; thus, application of the FAR OCI provisions alone will not always provide the KO with a defensible decision.⁷² The primary guidance on OCIs comes from case law.⁷³ The legal advisor must be familiar with and ensure that the KO understands the correct legal standard.⁷⁴ The KO receives from her legal advisor relevant research and advice based on the most current case law to inform her evaluation of potential OCIs. In addition, the legal advisor reviews the KO’s finding and evidence upon which it is based to confirm that the KO’s finding is reasonable, consistent with the legal standard, and supported by the evidence. The KO cannot

injunctive relief where the KO “knew or should have known” that a potential OCI existed earlier during the procurement and then failed to adequately investigate the potential OCI); *PCCP Constructors, JV, Comp. Gen. B-405036*, Aug. 4, 2011, 2011 CPD ¶ 156 (recommending that the KO conduct a reasonable OCI investigation where it failed to consider a potential OCI without discussing whether the protestor proffered any hard facts in support of a potential OCI).

⁶⁹ Michael Kracyinovich, *A Contracting Officer Guide for Navigating Organizational Conflict of Interest Waters 4* (Feb. 15, 2012) (unpublished manuscript) (on file with author).

⁷⁰ FAR, *supra* note 4, 9.504(b).

⁷¹ *See, e.g.*, *CACI, Inc.-Fed.*, Comp. Gen. B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 131, at 7 (noting that the “PM and contracting officer, as well as individuals associated with [the agency’s] Office of the General Counsel and Procurement Support Office, all participated in the OCI analysis, and clearly gave ‘meaningful consideration to whether an OCI exists’ . . .”); *The Analysis Grp.*, Comp. Gen. B-401726.3, Apr. 18, 2011, 2011 CPD ¶ 166, at 2 (finding no basis to question the adequacy of the agency’s investigative efforts where, among other things, “the agency assembled an OCI analysis team comprised of technical and program experts . . . to review the question of whether [the awardee] had a potential OCI”).

⁷² *See e.g.*, *Nash*, *supra* note 18 (noting, among others, that the specific FAR guidance regarding information received from the government only addresses information obtained from other contractors).

⁷³ *Id.*

⁷⁴ *See VSE Corp.*, Comp. Gen. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, at 19 (finding that, in addition to relying on assumptions, the KO’s decision was based “on an incorrect understanding of the applicable legal standards”).

assume her findings are reasonable without consulting with her legal advisor.

Just as the KO must seek the advice of her legal advisor, there are circumstances where the KO will need to rely on other subject matter experts. Consider, for example, an investigation of a potential unequal access to information OCI where one contractor hired a former government employee. In addition to statements about the former employee's duties, the KO may need to talk with someone in the IT department to get information on how the computer network is set up and what information the former employee had access to.⁷⁵ Similarly, where the information to which the employee had access is very technical, a subject matter expert can help the KO understand whether the information is competitively useful and articulate why or why not. Regardless of whether she includes individuals on her team or merely uses them as a resource, the KO must not undertake the OCI investigation alone, but should leverage the expertise of others to support and insulate her decision regarding the potential OCI.

B. The OCI Investigation Process

With an understanding of the role of the KO in the OCI investigation process, the next step is to discuss the process itself. During the OCI investigation, the KO gathers information necessary to adequately identify, evaluate, and document potential OCIs. Each step addresses a basis for GAO or the court to sustain a protest.

1. Identifying Potential OCIs

The initial step in an OCI investigation is to identify potential OCIs. Where the KO identifies potential OCIs, it is less likely that that a court or GAO will find that the KO failed to consider "an important aspect of the problem."⁷⁶ Most often, the KO will want to cast her net wide enough to ensure she reasonably identifies all potential OCIs.⁷⁷ Creating and comparing a list of potential contractors and a list of conflicted contractors is an effective way to identify potential OCIs.⁷⁸ Doing so makes potential OCIs easier to

⁷⁵ See *id.* at 15 (detailing the KO's investigation into whether a former employee had computer network access to source selection sensitive material and finding that, while she had established that the former employee had access to files based on declarations of those who ran the network, she did not identify specific information that the former employee could access).

⁷⁶ See *supra* note 57 and accompanying text.

⁷⁷ An exception to this is when the OCI investigation is done in response to a protest. In that case, the KO will focus on the potential OCI raised by the protestor. But even in this case, the KO should consider any related OCIs in responding to the protest.

⁷⁸ See Appendix (Creating Two Lists for Identifying Potential OCI) for questions to help create both lists.

identify and also creates a record that can be used to support the reasonableness of the KO's investigation and findings.

The first list that the KO creates is the potential contractor list. This is a list of potential or actual offerors, depending on the current state of the procurement. In addition to potential and actual offerors, the list should include any "friends and relations"⁷⁹ of those offerors; that is, the full spectrum of affiliates, subcontractors, parent companies, and other relationships whose conflicts may be imputed to the offeror.⁸⁰

The second list that the KO creates is the conflicted contractor list. This is a list of contractors with potential conflicts. It includes the contractors who have performed, are performing, or will perform contracts related to the current procurement. It includes contractors who have hired former government employees that worked on the current or related procurement. The KO should also consider including the "friends and relations" of these contractors with potential conflicts.

To identify potential OCIs, the KO simply compares each contractor listed on the potential contractor list against the contractors listed on the conflicted contractor list. The KO should update the lists throughout the procurement. For example, a contractor may hire a former government employee during the procurement process or may propose a subcontractor that the KO did not anticipate.⁸¹ This approach will help the KO identify not only current potential OCIs, but also those related to future procurements. In addition to demonstrating that the KO has considered the important aspects of the problem, properly identifying potential OCIs will also help establish the credibility of the KO.⁸²

⁷⁹ See generally A. A. MILNE, *POOH GOES VISITING* 19 (Dutton Children's Books 1993) (1926) (referencing the various associates of Rabbit, which, according to the illustration, include other rabbits, a squirrel, a hedgehog, mice, and insects).

⁸⁰ Thomas J. Madden, John J. Pavlick Jr. & James F. Worrall, *Organizational Conflicts of Interest/Edition III*, 94-08 BRIEFING PAPERS 1 (July 1994) (advising contractors to examine their "parent company and subsidiaries, affiliates, joint venture partners, and other related entities" when identifying potential OCIs).

⁸¹ See, e.g., PCCP Constructors, JV, Comp. Gen. B-405036, Aug. 4, 2011, 2011 CPD ¶ 156 (sustaining protest where program manager entered employment agreement with contractor and agreed to stop working on the procurement, but in fact remained involved in the procurement up until he left government employment).

⁸² See *Axiom Res. Mgmt., Inc. v. United States*, 78 Fed. Cl. 576, 599-600 (Fed. Cl. 2007) ("[T]he fact that neither [the requiring activity] nor the [KO] initially identified the 'unequal access to information conflict' nor to date has identified an apparent 'impaired objectivity conflict' significantly undermines the court's confidence, both in the [KO]'s conflict identification and wholesale endorsement of a voluntary mitigation plan.").

2. Evaluating Potential OCIs

Once potential OCIs are identified, the next step in the OCI investigation process is to evaluate each one. Because the potential OCI identification process described above is an attempt to identify all potential OCIs, some potential OCIs may not require significant evaluation, while others may involve a significant investment of time and resources.

The first step in evaluating each potential OCI is to determine whether any of the general rules under FAR 9.505-1 through 9.505-4⁸³ apply. These general rules can be described as delineating *per se* OCIs because they constrain the KO's discretion.⁸⁴ In these instances, the KO's evaluation of the potential OCI will focus on why the general rule does or does not apply. In the case of FAR 9.505-1, for example, the KO's analysis will primarily focus on whether the contractor provided systems engineering or technical direction. The advantage gained by the contractor in the subsequent procurement (e.g., the opportunity to influence the ground rules) is not relevant because once the KO determines that the contractor provided systems engineering or technical direction, the general rule does not allow the contractor to receive the contract.

Where the potential OCI does not implicate the general rules, for each identified potential OCI, the KO will determine which type of OCI potentially exists: biased ground rules, impaired objectivity, or unequal access to information.⁸⁵ Once she identifies the type of potential OCI, she will determine whether each element of that OCI exists.⁸⁶ By framing the evaluation by type of OCI, the KO will ensure that she gathers the relevant information and that her conclusions regarding the potential OCI reasonably follow from that information.

Once the KO has made her determination regarding each potential OCI, she should consider any proposed mitigation.⁸⁷ The KO should not consider mitigation prior to performing an initial evaluation of the OCI. Until she

⁸³ See *supra* note 24 and accompanying text. FAR, *supra* note 4, 9.505-3 (Providing Evaluation Services); FAR, *supra* note 4, 9.505-4 (Obtaining Access to Proprietary Information).

⁸⁴ See Webber & Quigley, *supra* note 52, at 6 (arguing that there is a "conclusive presumption of unfairness" where the activities covered by FAR 9.505-1 and 9.505-2(a)(1) and (b) are involved).

⁸⁵ See *supra* Part II.A.

⁸⁶ For example, if the potential OCI is a biased ground rules type OCI the KO would determine whether the potential contractor (1) occupied a position of influence and (2) whether that influence extended to the instant procurement. See *supra* Part II.A.1.

⁸⁷ OCI mitigation consists of actions or plans designed to "eliminate, or at least minimize, the impact of an OCI." Szeliga, *supra* note 6, at 665. For example, where an unequal access to information OCI exists, the government could release the information to all offerors to mitigate the effects of the OCI. See *id.* at 666.

understands the potential OCI and its possible effects, she is not in a position to evaluate whether the proposed mitigation adequately addresses the OCI. The process of evaluation is systematic and fact-intensive. At the same time, there are few bright lines; therefore, the KO must "exercise common sense, good judgment, and sound discretion" throughout the process.⁸⁸

3. Documenting Potential OCIs

Just as the FAR provides little guidance on conducting an OCI investigation, it provides no guidance on how to document that investigation. The FAR merely advises against "excessive documentation" and requires formal documentation of the KO's judgment only when "a substantive issue concerning potential organizational conflict of interest exists."⁸⁹ In at least one case, the court did not question the absence of any documentation regarding a potential OCI.⁹⁰ Despite this outlier, the KO should document her consideration of potential OCIs in every case.⁹¹

Some KOs use a Determination and Findings⁹² to document their investigations, while others use memoranda.⁹³ The format does not appear to matter, as

⁸⁸ FAR, *supra* note 4, 9.505.

⁸⁹ *Id.* 9.504(d).

⁹⁰ Beta Analytics Int'l, Inc. v. United States, 61 Fed. Cl. 223, 227 (Fed. Cl. 2004) (denying plaintiff's request for discovery regarding an OCI where the agency was silent on whether an investigation was done stating "the lack of any mention of an organizational conflict of interest may merely indicate that the contracting officer failed to discover a 'substantive issue concerning [any] potential organizational conflict of interest'").

⁹¹ See Jacobs Tech. Inc. v. United States, 100 Fed. Cl. 198, 212 (Fed. Cl. 2011) ("[T]o discourage future challenges to the adequacy of the OCI analysis, the Court strongly recommends that the analysis be documented.").

⁹² A Determination and Findings (D&F) is "a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions." The "determination" is the conclusion and is based on "findings," or facts, necessary to support the conclusion. FAR, *supra* note 4, 1.701. The FAR does not require a D&F for OCI investigations.

⁹³ Compare, e.g., PCCP Constructors, JV, Comp. Gen. B-405036, Aug. 4, 2011, 2011 CPD ¶ 156 (sustaining protest where KO used D&F), and Overlook Sys. Techs., Inc., Comp. Gen. B-298099.4, Nov. 28, 2006, 2006 CPD ¶ 185 (denying protest where KO used D&F), with Gen. Dynamics C4 Sys., Inc., Comp. Gen. B-407069, Nov. 1, 2012, 2012 CPD ¶ 300 (denying protest where KO used Memorandum of Evaluation of Potential OCI), and Cahaba Safeguard Adm'rs, LLC, Comp. Gen. B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39 (sustaining protest where KO used a memorandum), and C2C Solutions, Inc., Comp. Gen. B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38 (sustaining protest where KO drafted Pre-award OCI Analysis), and Harmonia Holdings, LLC, Comp. Gen. B-407186.2, 2013 WL 953353 (Mar. 5, 2013) (denying protest where the agency documented the OCI analysis in its acquisition plan). Many decisions do not state how the OCI investigation was documented.

GAO and the courts are more concerned with the substance of the documentation.⁹⁴ Whatever the format chosen by the KO for her findings, it should support the KO's findings by presenting them in a clear and logical manner. The findings should include a description of the investigation process, the relevant facts, the KO's analysis of those facts, and her conclusions based on her analysis. The KO should also include with her findings relevant documents or evidence that supports the facts and her analysis.

C. Practical Considerations

Remembering several practical considerations will help the KO conduct a reasonable OCI investigation. First, she must adequately scope the investigation. Second, she must seek and consider information from the contractor with the potential OCI. Third, she must not blindly rely on the assertions of the potential contractor. Fourth, she must validate the information that she relies upon to make her findings. Finally, she must remember that the OCI investigation does not end.

First, concurrent with identifying, evaluating, and documenting potential OCIs, the KO must ensure the investigation remains properly scoped. This is essential because OCI investigations "can quickly absorb scarce resources."⁹⁵ The FAR recognizes this and advises KOs to "avoid creating unnecessary delays, burdensome information requirements, and excessive documentation."⁹⁶ The scope of the investigation will depend on several factors, such as the type and complexity of the procurement⁹⁷ and when in the procurement process the investigation is being done. For example, an investigation in response to a protest will center on the OCIs alleged in the protest and only rarely would consider the potential OCIs of contractors not next in line for contract award.

Second, while the KO should not seek information outside the scope of the investigation, the KO must consider relevant information provided by a prospective contractor in

⁹⁴ See *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 519 (Fed. Cl. 2011) *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012) ("The process of identifying and mitigating a conflict is not a bureaucratic drill, in which form is elevated over substance, and reality is disregarded. . . . Rather, as will be seen, the FAR calls upon the KO to conduct a timely and serious review of the facts presented.").

⁹⁵ Sarah M. McWilliams, *Identifying Latent Organizational Conflicts of Interest*, CONT. MGMT, December 2007, at 12.

⁹⁶ FAR, *supra* note 4, 9.504(d).

⁹⁷ See McWilliams, *supra* note 95, at 8 (stating that acquisitions that are high dollar and complex, acquisitions for advisory/technical services, acquisitions for delivery of hardware and systems delivery, and acquisitions from organizations that use a significant embedded contractor workforce for performance of technical and management support are high-risk for generating OCIs).

her OCI investigation.⁹⁸ In addition to this requirement, GAO has imposed an obligation on the KO to give the prospective contractor notice of her OCI concerns and provide the contractor an opportunity to respond.⁹⁹ Generally, this exchange is not considered discussions¹⁰⁰ because OCIs are a matter of contractor responsibility.¹⁰¹ For these reasons, the KO should seek out information from the prospective contractor prior to making her findings.

Third, although the KO should seek out information from the contractor, she should not rely solely upon information provided by the prospective contractor.¹⁰² Further, when she does receive information from a prospective contractor, she must evaluate it herself.¹⁰³ For example, it is not unusual for solicitations to require offerors to certify that they do not have any conflicts of interest.¹⁰⁴ But even when a firm certifies that it has no conflict of interest, the KO must still make her own independent assessment. Where the KO fails to do so, the GAO will find that the investigation was unreasonable.

Fourth, along with independently evaluating contractor-provided information, the KO must validate the information upon which her findings rely. During the course of a protest, the protestor will have the opportunity to rebut the KO's findings.¹⁰⁵ Further, GAO may also request a hearing.¹⁰⁶

⁹⁸ FAR, *supra* note 4, 9.506(d) (2012).

⁹⁹ See *AT & T Gov't Solutions, Inc., Comp. Gen. B-400216*, Aug. 28, 2008, 2008 CPD ¶ 170, at 4 (sustaining protest where the agency did not provide AT&T the opportunity to respond to OCI concerns prior to disqualification).

¹⁰⁰ Discussions are exchanges between the government and offerors during a negotiated procurement. Under the FAR, if the government engages in discussions with one offeror, it is required to engage in discussions with all offerors in the competitive range. FAR, *supra* note 4, 15.306(d).

¹⁰¹ *Cahaba Safeguard Adm'rs, LLC, Comp. Gen. B-401842.2*, Jan. 25, 2010, 2010 CPD ¶ 39, at 7 ("Where an agency holds exchanges with an offeror regarding the offeror's plan to mitigate identified conflicts of interest, we have held that such exchanges do not constitute discussions and, as a consequence, they do not trigger the requirement to hold discussions with other offerors."); *but see Nortel Gov't Solutions, Inc., Comp. Gen. B-299522.5*, Dec. 30, 2008, 2009 CPD ¶ 10 (implying that where a change in the mitigation plan affects a technical or cost proposal the exchange would constitute discussions).

¹⁰² See FAR, *supra* note 4, 9.506 (2012) (advising KOs to first seek "information from within the Government and other readily available sources").

¹⁰³ See, e.g., *The Analysis Grp., LLC, Comp. Gen. B-401726*, Nov. 13, 2009, 2009 CPD ¶ 237 (sustaining protest where the agency merely accepted awardee's assertions that there were no OCIs without making its own independent determination).

¹⁰⁴ See, e.g., *id.* at 5–6. FAR 9.507 authorizes the KO to include provisions in the solicitation specific to potential OCIs.

¹⁰⁵ 4 C.F.R. § 21.3(i) (2012). It is also possible that GAO will require the agency to produce additional documents not previously provided by the agency during the protest. *Id.* § 21.3(g), (h), and (j).

The KO's findings may be found unreasonable if the information she relied upon is shown to be inaccurate, incomplete, or incorrect.¹⁰⁷

Finally, the OCI investigation does not end in a static determination.¹⁰⁸ The KO has "an ongoing responsibility to identify and evaluate potential OCIs."¹⁰⁹ An OCI investigation completed during acquisition planning, for example, may not have considered all actual offerors or proposed subcontractors. As a result, the KO will need to reevaluate potential OCIs once initial proposals are received. Further, the KO's initial determination likely does not account for mergers or a contractor hiring a former government employee.¹¹⁰

In the case of a protest, the KO should not stop investigating, even after the agency report is filed with the GAO. The GAO has indicated a willingness to consider new information related to potential OCIs after the agency report is filed.¹¹¹ If new information is provided to the GAO after the initial agency report is filed, the KO may need to include her analysis of that information.¹¹²

IV. Conclusion

Investigating OCIs is a job that must be accomplished. Legal counsel is essential at every stage if the job is to be done correctly; the FAR offers little instruction, and case law is the primary source of guidance on OCIs. Legal counsel must be familiar with applicable case law to advise the KO during the OCI investigation and to defend the KO's conclusions during any subsequent protest litigation.

Aided throughout the investigation, the KO will get the job done when investigating potential OCIs. Her investigation will specifically identify, methodically evaluate, and sufficiently document potential OCIs. Her investigation will support her conclusion—finding no OCI, mitigating the OCI, avoiding the OCI, or waiving the OCI.¹¹³ The KO's thorough and complete investigation will get the job done by strictly avoiding "any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships."¹¹⁴

¹⁰⁶ *Id.* § 21.7(a) (2012) (authorizing GAO to hold hearings in protest proceedings).

¹⁰⁷ *See, e.g.,* Alion Sci. & Tech. Corp., Comp. Gen. B-297342, Jan. 9, 2006, 2006 CPD ¶ 1, at 11 n.17 (noting that an engineer's testimony on the frequency with which OCIs would occur during contract performance contradicted the OCI evaluation and testimony provided by the KO in holding the KO's findings unreasonable).

¹⁰⁸ *See* McWilliams, *supra* note 95, at 8 (outlining a "cradle to grave" process for conducting OCI reviews that includes consideration of potential OCIs at pre-solicitation, evaluation, pre-award, and post-award). *See also* Nuclear Production Partners LLC, B-407948, April 29, 2013, 2013 CPD ¶ 112, at 15 (accepting the KO's conclusion that "various uncertainties" regarding the agency's future, related procurement made its full consideration of the alleged OCI premature prior to the award of the current contract, thus allowing the current procurement to proceed).

¹⁰⁹ *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 210 (Fed. Cl. 2011).

¹¹⁰ *See* PCCP Constructors, JV, Comp. Gen. B-405036, Aug. 4, 2011, 2011 CPD ¶ 156 (finding the KO's investigation unreasonable where her OCI investigation was dated six months after the former employee began working for the contractor, yet the KO had not contacted him since his retirement from the agency).

¹¹¹ *McTech Corp.*, Comp. Gen. B-406100, Feb. 8, 2012, 2012 CPD ¶ 97, at 5 ("[A]n agency may provide further information and analysis regarding the existence of an OCI at any time during the course of a protest, and we will consider such information in determining whether the [KO]'s OCI determination is reasonable.").

¹¹² *See* VSE Corp., Comp. Gen. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, at 15 (noting that "the [KO] has not commented on the post-hearing declarations, and thus has not made any findings based on the new information" apparently indicating that GAO's role is to evaluate the reasonableness of the KO's investigation and thus cannot use information not considered by the KO to support her findings).

¹¹³ *See* *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 519 (Fed. Cl. 2011) *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012) (stating that the KO has only three courses of action once she finds an OCI).

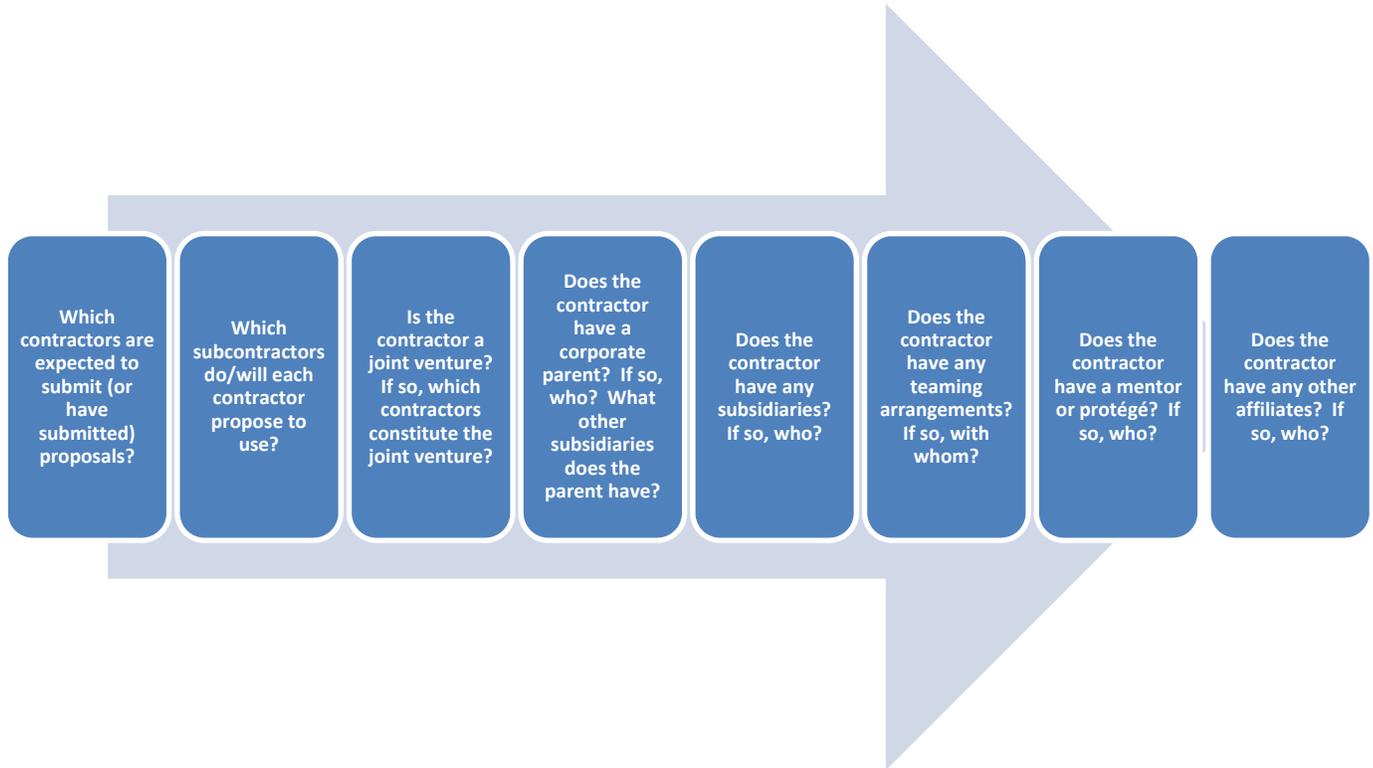
¹¹⁴ FAR, *supra* note 4, 3.101-1.

Appendix

Creating Two Lists for Identifying Potential OCIs

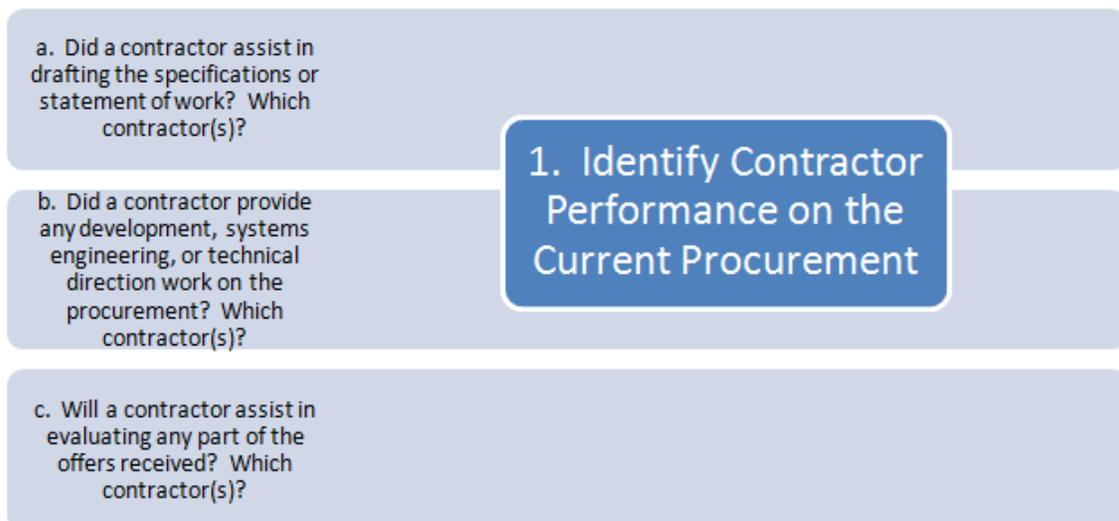
Creating the Potential Contractor List

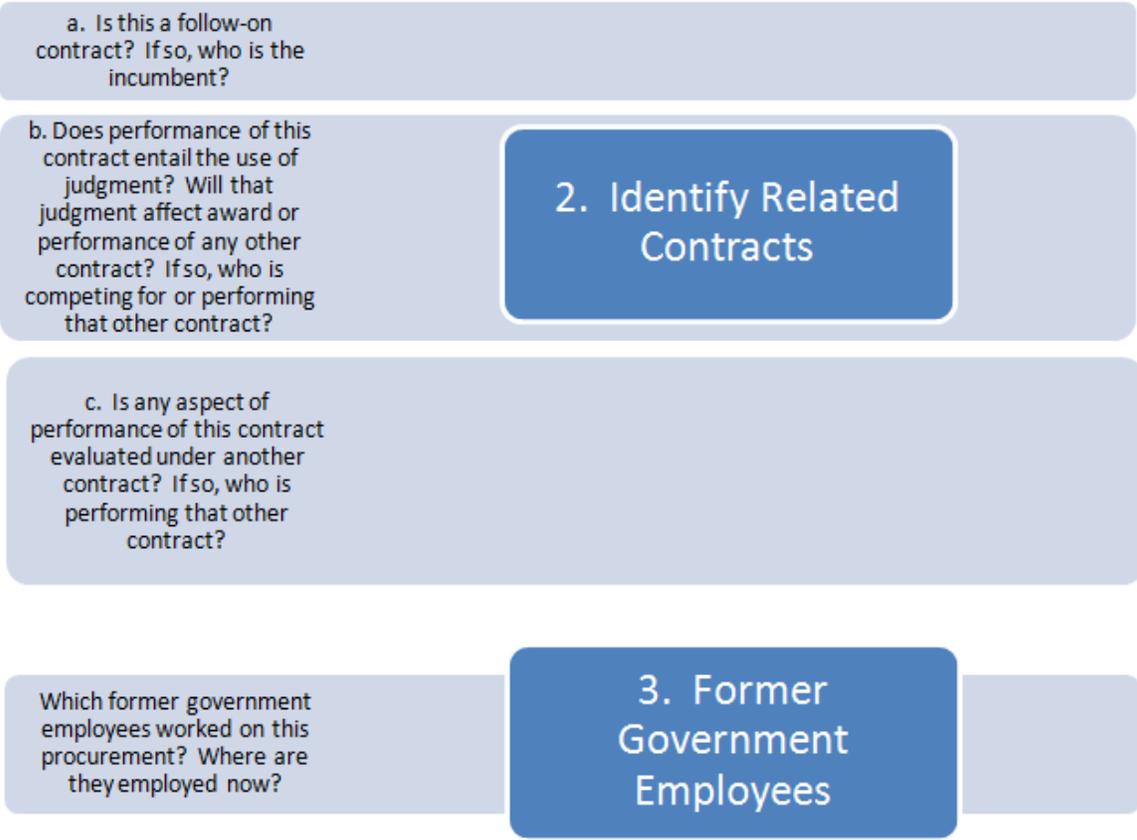
The potential contractor list begins with identifying the contractors that are expected to submit or have already submitted proposals. The KO then builds from that initial list to identify the corporate friends and relations that may have OCIs that can be imputed to the offeror. How extensive this list is will largely depend on the complexity of the procurement. The questions below will ensure firms related to the current procurement are identified.



Creating the Conflicted Contractor List

The steps and questions below will help identify potential sources of OCIs.





For additional questions, see Sarah M. McWilliams, *Identifying Latent Organizational Conflicts of Interest*, CONTRACT MGMT., Dec. 2007, at 16.