

**RECENT ORGANIZATIONAL CONFLICT OF INTEREST  
DECISIONS AT THE GAO AND COURT OF FEDERAL CLAIMS**

**ABA Bid Protest Committee Meeting  
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**1. GAO Sustains Protest Where EPA Failed to Consider Lockheed Martin's Potential OCIs But Later Denies Protest Against EPA's Corrective Action**

On May 3, 2004, the U.S. General Accounting Office (GAO) sustained a protest where the contracting agency failed to consider the impact of potential organizational conflicts of interest (OCIs) in selecting the proposal of Lockheed Martin Services, Inc. (Lockheed Martin) for award. Science Applications International Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶96. The protest involved an approximately \$700 million procurement by the U.S. Environmental Protection Agency (EPA) for an indefinite-delivery/indefinite-quantity contract covering a wide variety of systems engineering services. The services are required to assist the EPA in meeting its strategic objectives and responsibilities under federal legislation and executive orders. SAIC alleged that Lockheed Martin failed to properly disclose its ongoing involvement in activities that are subject to environmental regulations, including its ownership and/or operation of manufacturing and production facilities that produce or handle hazardous materials subject to federal, state, and local environmental regulations. SAIC further alleged that the EPA failed to properly consider the extent to which such involvement might impair Lockheed Martin's judgment and objectivity in performing certain tasks contemplated by the contract's statement of work, including tasks associated with statistical services and environmental modeling. In response, EPA admitted that it did not consider the impact that Lockheed Martin's environmentally-regulated activities may have on its performance of the contract. The EPA claimed, however, that it did not have to do so because the procurement is for computer support/systems engineering services, not enforcement or regulatory advice. The EPA also argued that it intended to engage in ongoing monitoring and supervision of Lockheed Martin's contract performance in a manner that would effectively neutralize potential OCIs.

In sustaining the protest, the GAO stated that it was unpersuaded that the EPA could reasonably conclude that it need not give any consideration to Lockheed Martin's potential impaired objectivity. The GAO stated that there were various portions of the statement of work that directly conflicted with the EPA's representations that the contract is unrelated to the agency's environmental responsibilities. The GAO also observed that Lockheed Martin's own proposal supported SAIC's assertions that the contract's scope of work encompasses various activities associated with the EPA's assessment of environmental conditions. Moreover, during a hearing in the protest, the EPA admitted that the statement of work included tasks that, in certain circumstances, would "clearly" present a conflict of interest if performed by Lockheed Martin.

Regarding the EPA's claim that it would effectively neutralize potential OCIs through monitoring and supervision of Lockheed Martin's contract performance, the GAO stated that such post-award assertions do not negate the EPA's pre-award obligation, under Subpart 9.5 of the Federal Acquisition Regulation, to "identify and evaluate" potential OCIs. Here, according to the GAO, the record unambiguously established that the EPA gave no consideration to Lockheed Martin's past and ongoing performance of environmentally-regulated activities and, similarly, gave no consideration to the impact those activities could have on Lockheed Martin's judgment and objectivity in performing certain tasks that are reasonably within the scope of the contract. Accordingly, the GAO recommended that the EPA perform a thorough assessment of Lockheed Martin's environmentally-regulated activities in the context of the entire scope of work to be performed under the contract, and perform a reasonable, documented assessment that identifies and evaluates potential OCIs that may arise due to Lockheed Martin's environmentally-regulated activities and interests.

In response to the GAO's decision and recommendation concerning corrective action, the EPA requested, received and considered additional information regarding Lockheed Martin's past and ongoing environmentally-regulated activities. Thereafter, the EPA performed and documented its analysis of whether such activities would reasonably affect the objectivity with which Lockheed Martin would perform the services contemplated by the contract and found that no actual or potential conflicts of interest existed. SAIC timely protested EPA's corrective action. See Science Applications Int'l Corp., B-293601.5, Sept. 21, 2004 (SAIC II).

In SAIC II, SAIC protested the EPA's determination that no actual or potential OCIs existed due to Lockheed Martin's environmentally-regulated activities. In denying the protest, GAO acknowledged that although Lockheed Martin's affiliates are involved in widespread environmentally-regulated activities, it appeared that a significant majority of the tasks reasonably contemplated under the EPA contract have no potential to create conflicts of interest. The GAO stated that SAIC's earlier protest was sustained because it was clear that the EPA gave *no* consideration to potential conflicts of interest. In SAIC II, the GAO held that the record established that the agency requested and received information regarding Lockheed Martin's environmentally-regulated activities, it reasonably considered that information in the context of anticipated requirements, and accepted responsibility for performing an independent and ongoing assessment of potential OCI's each time a task order is issued in the future. In denying the protest, the GAO noted that it will not sustain a protest challenging a determination in this area unless the agency's determination is unreasonable or unsupported by the record.

## **2. GAO Sustains Protest Where Navy Failed to Consider Northrop Grumman's Potential OCIs**

On August 16, 2004, the U.S. General Accountability Office (GAO) sustained a protest where the contracting agency failed to consider the impact of potential organizational conflicts of interest (OCIs) in selecting Northrop Grumman Defense Mission Systems, Inc. (Northrop Grumman) for award. PURVIS Systems, Inc., B-293807.3, et al., August 16, 2004, 2004 CPD ¶177. The protest involved an approximately \$18 million procurement by the U.S. Navy for analytical and technical support for two Navy programs - the Ship Anti-submarine Warfare Readiness Effectiveness Measuring (SHAREM) program and the Mine Readiness Effectiveness

Measuring (MIREM) program. The SHAREM and MIREM programs are anti-submarine and anti-mine programs intended to assess the readiness and effectiveness of Navy Surface forces. As part of this effort, these programs involve at-sea exercises. During these at-sea exercises, the performance of surface air, and subsurface systems were to be evaluated. Northrop Grumman manufactures several undersea warfare systems that could be evaluated during these exercises. PURVIS alleged that the Navy failed to properly evaluate Northrop Grumman's proposal with regard to potential conflicts of interest. Specifically, PURVIS maintained that both Northrop Grumman's OCI plan and the agency's evaluation of that plan failed to reasonably recognize or evaluate various situations creating potential OCIs for Northrop Grumman, including the OCI created by Northrop Grumman's significant involvement in evaluating the performance of its own, albeit mature and fielded, undersea warfare systems. In response, the Navy asserted that the requirements in the solicitation did not involve subjective input or judgments on the part of the awardee and, accordingly, there were no "impaired objectivity" OCI issues.

In sustaining the protest, the GAO stated that it was unpersuaded that the Navy could reasonably conclude that the requirements would not involve subjective input or assessments on the part of Northrop Grumman. The GAO stated that there were various portions of the statement of work (SOW) that directly conflicted with the Navy's representations that the requirements did not involve subjective assessments that Northrop Grumman would be required to perform. Indeed, the GAO observed that the SOW listed numerous activities that either expressly or inherently involve analysis, evaluation, and judgment on the part of the awardee. Moreover, the GAO found that the Navy's evaluation assessment reflected its expectation that the awardee would provide subjective input and judgment in performing the contract. Citing Science Applications Int'l. Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶96, the GAO opined that the Navy's determination concerning Northrop Grumman's potential OCIs lacked a reasonable basis.

PURVIS also argued that Northrop Grumman's OCI plan failed to demonstrate a reasonable understanding of situations that create impaired objectivity concerns. Northrop Grumman's OCI plan stated that no OCI issues would be created by its evaluation of its own "mature, fielded" systems as part of the procurement process. The GAO rejected Northrop Grumman's assumption that impaired objectivity OCIs can arise only within the procurement process. To the contrary, the GAO stated that a situation where, as in this protest, a company is responsible for assessing the performance of systems it has manufactured is a "classic example" of an impaired objectivity OCI-without regard to whether the evaluation occurs as part of the procurement process. The GAO also noted that Northrop Grumman's plan acknowledged that evaluation of systems that are under development by Northrop Grumman could cause the perception of a potential OCI issue. Accordingly, the GAO concluded that Northrop Grumman's OCI plan was fundamentally flawed because it failed to recognize or otherwise address multiple situations that create potential impaired objectivity OCI concerns.

### **3. COFC Sustains Protest Where Army Failed to Comply With Multiple FAR OCI Provisions**

On April 13, 2004, the U.S. Court of Federal Claims (COFC) sustained a protest where the Army failed to adhere to the FAR's procedural requirements for addressing potential OCIs and, in addition, ran afoul of the FAR's OCI prohibition regarding contractors performing systems

engineering and technical direction. Filtration Development Co., LLC v. United States, No. 03-2835C, 60 Fed. Cl. 371 (2004). The protest involved a procurement by the U.S. Army for engine inlet barrier filter (IBF) system kits, primarily for UH-60 Blackhawk helicopters scheduled to be deployed in Iraq, to reduce damage caused by the ingestion of sand and foreign particles. The alleged OCI revolved around Westar Corporation. In May 2000, Westar received a contract under which it was responsible for performing systems engineering and technical direction (SETA) tasks, including tasks relating to the propulsion system - including engine barrier filters - for Blackhawk helicopters. In May 2003, Westar also participated in meetings with the Army regarding the Blackhawk IBF systems as well as Westar's capabilities. In August 2003, the Army directed Sikorsky Aircraft Company, which was responsible for designing, developing, and manufacturing the Blackhawk helicopter, to immediately begin incorporating an engine filtration design concept developed by Aerospace Filtration Systems (AFS). AFS, however, was a division of Westar, which, due to Westar's Blackhawk propulsion system work under its SETA contract, resulted in a potential OCI. In December 2003, after issuing a Justification and Approval and invoking the unusual and compelling urgency exception to the requirement for full and open competition, the Army executed a modification to Sikorsky's Blackhawk production contract to procure the IBF kits. Notwithstanding the fact that the plaintiff previously expressed an interest in providing the kits, the Army concluded that Sikorsky was the only contractor that could complete the assignment within the requisite time frame.

In protesting the Army's decision to procure the IBF kits from Sikorsky, the plaintiff claimed that the Army had failed to comply with the FAR's OCI provisions. The COFC agreed with the plaintiff in at least three respects. First, the COFC concluded that the Army's identification of the Westar OCI did not occur "as early in the acquisition process as possible," as required by FAR 9.504(a)(1). The court noted that there was no recognition of any conflict in May 2003 when the Army began its discussions with AFS, even though there were clear signs that AFS was a division of Westar, nor did the Army recognize any OCI concerns when it directed Sikorsky in August 2003 to incorporate AFS's filter system into the Blackhawk.

Second, although the Army in the fall of 2003 appeared to recognize that there was a potential OCI, the COFC disagreed with the Contracting Officer's determination that no significant OCI was present and that no further action on her part was required. The court noted that the Contracting Officer had contacted other Government personnel to apprise her of the situation, who informed her that they recognized a potential Westar OCI. Moreover, Westar submitted at least two proposed (but unexecuted) OCI mitigation plans. Therefore, because there apparently was a significant potential OCI, the court concluded that the Contracting Officer exceeded her authority under the FAR when she concluded that appropriate safeguards were in place to eliminate the conflict. Specifically, the Contracting Officer failed to abide by FAR 9.506(b), which provides that the authority to approve, modify, or reject the recommended course of action for avoiding, neutralizing, or mitigating an OCI rests with the chief of the contracting office.

Third, the COFC concluded that the Army violated FAR 9.505-1(b), which provides that, where a contractor provides SETA services for a system (but does not have overall contractual responsibility for its development, production, assembly, etc.), the contractor is prohibited from supplying the system or its major components or acting as a subcontractor or consultant to such a supplier. Since Westar agreed to provide SETA services for the Blackhawk propulsion systems

under its May 2000 contract, Westar and its affiliates, including AFS, were "categorically precluded" from supplying any Blackhawk propulsion system components, including the IBF kits. Accordingly, an actual OCI arose due to Westar's occupation of an impermissible dual role.

Although the COFC therefore sustained the protest, the court, due to national security considerations, refused to disturb the award to Sikorsky for the IBF kits for which funding had been allocated and a delivery schedule had been set. However, the court held that national defense considerations could not justify an indefinite extension of the unusual and compelling urgency exception and, accordingly, it enjoined the Army from procuring any additional kits from Sikorsky under the current Justification and Approval.