The Federal Acquisition Regulations (FAR) define an organizational conflict of interest as a conflict that may occur 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."

Accountants don't care very much about organizational conflicts of interest (OCIs). OCIs have nothing to do with debits or credits or dollar signs. But companies who want to successfully capture government work need to care about OCIs—quite a bit, actually. We've previously discussed OCIs **here** and **also here**, and **also over here**, noting that—

Savvy readers will understand that the regulations are just words, and that the words are given meaning and come alive via interpretations provided by the Courts. So it is, with respect to OCIs, that the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (CoFC) have interpreted various aspects of OCI rules in their bid protest decisions.

OCIs are intractable little problems, both vague and complex by their very nature. Normally, one hears about OCIs when somebody **protests an award**. Sometimes OCIs arise in the context of **testing products** for acceptance and/or suitability. Here's a story about an OCI in the context of a bid protest. What makes this story different is that the Court found the elimination of a bidder, based solely on an alleged OCI, to be unreasonable. We think it's worth exploring a little.

On July 16, 2010, the U.S. Court of Federal Claims issued a **decision** in the matter of T

urner Construction Co., Inc. v. United States
, with McCarthy/Hunt, J.V. and
B.L. Harbert-Brasfield & Gorrie, JV,
as intervenors. At stake was the contract to replace the Army Community Hospital at Fort Benning, Georgia. The contract was originally awarded to Turner in September, 2009, after 15 months of conducting the procurement and evaluating offerors. Two competitors (the "intervenors" in the current action) protested the award to the Government Accountability Office (GAO). In February, 2010, GAO recommended that the Army should "strip Turner of the contract" because of Turner's alleged OCIs, and "reprocure the contract." In March, 2010, the Army announced that it would "not waive" Turner's OCIs, and follow the GAO recommendation. Turner protested
that
decision before the Court of Federal Claims.

Turner argued that the GAO bid protest decision and subsequent recommendation to the Army "lacked a rational basis." In addition, Turner argued that the Army accepted GAO's recommendation without evaluating it, and did not "reasonably evaluate" Turner's request to waive its OCIs. Turner's alleged OCIs are rather complex so we'll devote some space to discussing them.

To develop its hospital design, the Army obtained technical design assistance from a Joint Venture consisting of Hayes, Seay, Mattern, & Mattern (HSMM) and

Hellmuth, Obata & Kassbaum, Inc. (HOK). HSMM was a wholly owned subsidiary of AECOM. As part of its duties, HSMM assisted the Army's Technical Review Board in evaluating proposals received from bidders on the hospital replacement project. Turner was not only the lowest price offer, but the company also scored well in the technical evaluations.

Turner's proposal anticipated awarding a subcontract to a Joint Venture consisting of Ellerbe Becket (EB) and another firm. In October, 2009, after a long courtship, EB was acquired by AECOM. In July 2009 (during the courtship), it came to the attention of one the HSMM participants that an OCI might exist, as AECOM was then in negotiations to acquire EB. (Note that the OCI might be created because AECOM would own a participant in the proposed project (EB) and a participant in the project design (as well as a participant in the technical evaluation) (HSMM). This "alignment of interests" might be sufficient to create an OCI.) The HSMM employee immediately brought the matter to the attention of the Contracting Officer and the Army's legal counsel. They decided that the one HSMM participant who knew of the potential merger would recuse himself from further participation in the proposal evaluations, but that the other HSMM participants, who were not aware of the ongoing discussions between EB and AECOM, would be allowed to continue their participation.

We have discussed before the three "different flavors" of OCI. With respect to the award of the hospital replacement contract to Turner, "both protesters

alleged the existence of 'biased ground rules' and 'impaired objectivity' OCIs, and McCarthy/Hunt additionally alleged an 'unequal access to information' OCI," according to the Court.

During the protest proceedings before the GAO, the Contracting Officer "addressed each possible type of OCI and found that no OCIs existed prior to award of the contract." However, GAO "disagreed" with those conclusions, and "sustained the 'unequal access to information' and 'biased ground rules' protests."

While the protest was pending before the GAO, much discussion and debate ensued regarding whether the Army would waive any OCIs. As the Judge Futey (writing for the Court) reports, ultimately the Army decided not to grant Turner a waiver.

After receiving the GAO's recommendation, the Army terminated Turner's contract and Turner filed a protest with the CoFC. Based on the protest grounds, the Court needed to review the GAO's decision, even though normally

such decisions are granted "a high degree of deference." But the deference shown to GAO's decisions is not absolute, and executive agencies cannot simply rely on a GAO decision to implement an unreasonable course of action. As the Judge Futey wrote, "an Agency's decision to follow the recommendation of the GAO in a bid protest decision is arbitrary and capricious if the GAO decision was irrational." Judge Futey found—

According to Turner, the GAO conducted a *de novo* review of the record that supplanted the CO's decision, which was based on 'hard facts,' with a decision based on 'mere inference and suspicion.' … plaintiff [Turner] argues that 'the assessment of OCIs is a fact-specific inquiry the CO must undertake, and under the facts here, the CO reasonably concluded there was no OCI, and GAO erred in substituting its judgment for that of the CO.'

Judge Futey concluded that, "it was irrational in this case to depart from precedent and not consider the factually-based arguments of Turner and the Army, especially when the GAO was tasked with looking for 'hard facts' of an OCI." Moreover, Judge Futey wrote that—

This Court thus finds that the GAO lacked a rational basis because it overturned the CO's determination without highlighting any hard facts that indicate a sufficient alignment of interests. Because the GAO lacked a rational basis, the Army was not justified in following its recommendation. …

… the GAO failed to adhere to the proper standard of review. The GAO's task was to review the agency's decision for reasonableness. That agency decision, as described above, tracked the precise state of negotiations between AECOM and EB, the exact dates upon which critical changes to the RFP occurred, the exact employees that could have known of the merger, and numerous other facts. Using this data, the CO concluded that no OCI existed. The GAO failed to address this OCI decision; in fact, the GAO decision on a biased ground rules OCI *does not even cite* the agency decision that it was tasked with reviewing. Instead, the GAO cites exactly one piece of information—the text of AECOM's contract with the agency—to support its finding that the record 'suggests' that AECOM had 'special knowledge' that would have given Turner an unfair advantage.

(Emphasis in original.)

Turner was granted the permanent injunction it sought. The Army was ordered by the Court to “restore” the original hospital replacement contract to Turner and “not reprocure the contract to another firm.”

Are there any lessons to be learned here? We think so. When two Government contractors are considering a merger/acquisition, it is important to review existing contractual relationships to see if any actual, or potential, OCIs might exist. And it is not only existing contracts that need to be reviewed, but also future contracts and pending proposal submissions. Pipelines of potential contract activity need to be reviewed with a discerning eye, to see if a situation like that experienced by Turner might exist.

And please note that Turner itself did not have the alleged OCI. It was Turner’s subcontractor, EB (who was actually one member of a Joint Venture), that had the alleged OCI. This fact suggests that the level of due diligence inquiry needs to be quite a bit more granular than simply looking at the two prime contractors to see if a potential OCI might exist. This is a demanding task, and one that time

and budgetary constraints might not always permit. But as this article demonstrates, one ignores that level of inquiry at one's own peril.