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The Dangers Of Courtship: Organizational Conflicts Of Interest Arising From Contemplated Corporate Transactions

By Keith R. Szeliga

As the economy begins to recover, the number of corporate transactions between Government contractors no doubt will increase. If your company is positioned as a potential acquirer or a potential target, you should be aware of a recent Government Accountability Office ("GAO") decision holding that entering into negotiations for a corporate transaction can give rise to an organizational conflict of interest ("OCI") well before, and potentially whether or not, the transaction actually occurs. *See McCarthy/Hunt, JV*, B-402229, Feb. 16, 2010, 2010 CPD ¶ 69.

Factual Background

The *McCarthy/Hunt* protest involved a United States Army Corps of Engineers ("Corps") procurement for the design and construction of a hospital at Fort Benning, Georgia.

In June 2007, the Corps contracted with HSMM/HOK Martin Hospital Joint Venture ("HSMM/HOK") to assist with preparing the solicitation and evaluating proposals for the Fort Benning contract. In May 2008, HSMM/HOK's parent company, AECOM Technology Corporation ("AECOM"), entered into negotiations for the possible acquisition of design firm Ellerbe Becket ("EB").

The Corps issued the Fort Benning solicitation in June 2008. An AECOM executive learned, in August 2008, that EB intended to team with another contractor to pursue the Fort Benning contract. The AECOM executive was concerned that negotiating the acquisition of a firm that had been proposed as a subcontractor, in a procurement for which HSMM/HOK was providing acquisition support services, could create a potential OCI. Yet he did not disclose this issue to the Contracting Officer for nearly one year.

The Contracting Officer determined that the recusal of AECOM's executive from the Technical Review Board ("TRB") would avoid any potential OCI because he was the only member of the TRB aware of the negotiations between AECOM and EB. The Contracting Officer did not address the fact that AECOM had been engaged in negotiations with EB at the time HSMM/HOK was working on the solicitation.

The Corps ultimately awarded the Fort Benning Contract to Turner Construction Company ("Turner"), the offeror that had proposed to utilize EB as a subcontractor. Less than one month later, EB announced its merger with AECOM.

GAO Protest

McCarthy/Hunt filed a GAO protest alleging that Turner/EB was ineligible for award based on various OCIs resulting from its relationship with EB. Among other things, McCarthy/Hunt argued that Turner/EB, through AECOM and HSMM/HOK, had unequal access to non-public information that placed it at an unfair advantage in competing for the Fort Benning contract. McCarthy/Hunt further alleged that Turner/EB had a biased ground rules OCI because AECOM and HSMM/HOK had the means and the incentive to influence the terms of the Fort Benning solicitation to favor Turner/EB.

The GAO sustained McCarthy/Hunt's protest and recommended that the Corps disqualify Turner/EB from the competition.

Turner/EB argued that the relationship between AECOM and EB was too attenuated to give rise to an OCI until the acquisition was completed. The GAO rejected this argument, holding that, as a result of the merger negotiations, AECOM's and EB's interests were sufficiently aligned to create a potential OCI. The fact that the negotiations were sporadic and extended over a long period of time did not allay the GAO's concerns.

The GAO concluded that an unequal access to information OCI existed because AECOM, through HSMM/HOK, had access to non-public information regarding the agency's priorities, preferences, and dislikes relating to the Fort Benning contract. The GAO emphasized that such information would have been particularly valuable to Turner/EB because the solicitation afforded offerors wide latitude in determining how to meet the Corps' requirements.

Turner/EB contended that a confidentiality agreement between AECOM and EB mitigated any potential OCI. The GAO rejected this argument because the record contained no evidence of an effective OCI mitigation plan that was disclosed and approved by the Contracting Officer. There was no firewall to prevent HSMM/HOK personnel from learning of the potential EB acquisition or from disclosing procurement sensitive information to Turner/EB. Nor was there any record of the specific individuals who were aware of the merger negotiations, or of any physical or electronic access control measures.

The GAO also found that Turner/EB had a biased ground rules because HSMM/HOK, as the agency's acquisition support contractor, was in a position to influence the Fort Benning solicitation to favor the capabilities of Turner/EB. Although the Corps asserted that there was no evidence that HSMM/HOK had skewed the competition to favor Turner/EB, the GAO held that the mere fact that HSMM/HOK was in a position to affect the competition, and had an incentive to do so, was sufficient to create an OCI.

Lessons Learned

The *McCarthy/Hunt* case illustrates several key points regarding the mitigation of OCIs, both generally and in the context of corporate transactions.

First, the case highlights the importance of addressing potential OCI considerations as early as possible in merger discussions. *McCarthy/Hunt* stands for the proposition that entering into merger discussions with another Government contractor, without more, may give rise to an OCI. Thus, immediately upon execution of a confidentiality agreement relating to a corporate transaction, the parties should analyze whether they hold any contracts that would give rise to an OCI if performed by a single entity. This review should focus on contracts involving acquisition support services and Systems Engineering and Technical Assistance ("SETA") services. The contractor personnel performing those services should be excluded from the review. Under no circumstances should they have access to any information that would suggest the possibility of a corporate transaction.

Second, the GAO's analysis in *McCarthy/Hunt* illustrates the key elements of an adequate OCI mitigation plan for corporate transactions. The plan must include policies and procedures sufficient to ensure that SETA and acquisition support personnel do not divulge proprietary or source selection sensitive information. Conversely, the plan must ensure that SETA and acquisition support personnel do not become aware of contemplated corporate transactions. In addition to strict nondisclosure agreements, it is necessary to implement physical and electronic access controls to prevent the flow of sensitive information. As with any OCI mitigation plan, training, audits, and reporting mechanisms also should be included.

Third, the case illustrates the importance of working with the Contracting Officer to identify and mitigate potential OCIs. In sustaining McCarthy/Hunt's protest, the GAO emphasized that AECOM did not disclose the potential OCI to the Contracting Officer for nearly one year, did not advise the Contracting Officer of the full extent of the OCI, and did not submit, much less obtain the Contracting Officer's approval, for a formal OCI mitigation plan. The lesson to be learned here is simple – if you want your OCI mitigation plan to withstand the GAO's scrutiny, you must timely advise the Contracting Officer of the potential OCI and obtain the Contracting Officer's approval of the plan.

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