

# Federal Courts Overrule GAO and Require Reinstatement of Low Bidder

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Contractors who file a bid protest challenging a federal contract award can do so in one of three forums: (1) the agency whose procurement decision is being challenged; (2) the Government Accountability Office ("GAO"); or (3) the Court of Federal Claims ("COFC"). Many federal contractors choose to file protests with the GAO because the GAO represents the middle ground between an agency-level protest and a COFC protest. Typically, a protestor wants to avoid filing a protest in the very agency whose conduct is being protested and wants to avoid the time and expense of filing a protest with the COFC. Additionally, although GAO decisions are non-binding, they have almost always been fully implemented by the Contracting Officer ("CO") of the applicable agency and have traditionally been given a high level of deference by the COFC. However, a case decided by the COFC this past year may signal the deterioration of high deference afforded to GAO decisions.

In *Turner Construction Co., Inc. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011) ("*Turner II*"), the United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims' ("COFC") decision in *Turner Construction Co., Inc. v. United States*, 94 Fed.Cl. 561 (2010) ("*Turner I*") that a GAO bid protest recommendation was irrational. The COFC held that the GAO's recommendation that Turner Construction Co. ("Turner") be disqualified as the awardee on the basis of organizational conflicts of interest ("OCI") under an Army hospital renovation contract was unreasonable.

Specifically, the COFC found that the GAO had failed to meaningfully consider the contracting officer's ("CO") findings and substituted its own judgment for that of the CO's by determining that the record indicated that there was an OCI due to merger discussions between Turner's design subcontractor and the parent company of the Army's design consultant that gave Turner an unfair advantage.

Of significance was the COFC's determination that the CO complied with FAR requirements 9.504(a)(1) and (2), which require a CO to (1) identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible and (2) avoid, neutralize, or mitigate significant potential conflicts before contract award, even though the CO had not conducted a documented investigation into whether OCIs existed prior to the award. Additionally, the COFC held that "hard facts" and not suspicion and innuendo are needed to show the existence of an OCI, and that the GAO had only inferred the existence of an OCI and the harm arising therefrom.

In *Turner II*, the court affirmed the COFC's finding that the GAO irrationally refused to follow the CO's fact-based conclusion that no OCI existed. The court further held that the COFC properly ordered the Army to restore the contract with Turner based on the COFC's broad equitable powers to fashion appropriate remedies. Sheppard Mullin's Government Contracts Group previously discussed *Turner I* in [A Retreat From Hard Line OCI Decisions? The COFC Overturns A Controversial GAO Ruling](#).

*Turner II* is a reminder that the COFC has the independent jurisdiction to review underlying procurement decisions, as well as GAO decisions, even when the GAO recommends that an agency take corrective action. In the *Turner* cases, the Army was required to restore Turner's contract, even though the Army had previously followed the GAO's recommendation to rescind the contract. The *Turner* cases may signal a shift in the Federal Courts to give more weight to the CO's decision on a bid protest and less weight to the GAO's recommendations.

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