SCENARIOS – Table of Cases

Procedural – Contracting Officer

Procedural – Forums

Substantive – Unequal Access to Information

Substantive – Impaired Objectivity

Substantive – Biased Ground Rules

A1 – The Contracting Officer's Responsibility

GSA issued a solicitation for support services for the Air Force. Under task three, which was not issued at the time of award but was within the scope of the contract, the contractor would be required to provide a broad range of advisory and assistance services, including technical analysis relating to the agency's selection of products and services to Counter Chemical, Biological, Radiological and nuclear (C-CBRN) weapons. The agency received quotations from TAG and SAIC.

The solicitation required offerors to submit an OCI statement. SAIC, which sells C-CBRN-related detection and prevention products and services, submitted a statement that said:

> SAIC acknowledges there are no known real or perceived conflicts of interest. SAIC agrees and certifies to disclose information concerning the actual or potential conflict with any proposal for any solicitation relating to any work in this effort, and to handle all actual or potential OCI situations in accordance with FAR subpart 9.5.

The contracting officer reviewed the contents of SAIC's OCI statement and determined that there was no reason to conclude that SAIC had an OCI. The contracting officer also determined that it would be sufficient to monitor SAIC during performance to ensure that there are no OCIs. SAIC was selected for award.

TAG protested the award on the grounds that SAIC had an impaired objectivity OCI because any advice given under task three could affect sales of its products.

(a) Should TAG's protest be sustained?

(b) If so, what remedy should GAO recommend?

A2 – The Unread Mitigation Plan

On January 2, 2008, the Navy issued an RFP seeking to make a "best value" award of an IDIQ contract for IO support services, including analysis of computer network security systems.

The RFP advised that the contracting officer would evaluate all proposals to determine whether a prime contractor or subcontractor had an actual or apparent OCI in performing the RFP's tasks. The RFP did not specifically request mitigation plans from offerors that might have an OCI; rather, it stated that firms with even an appearance of an OCI "will be disqualified and eliminated." The RFP specifically provided that "to the extent work to be performed requires evaluation of offers for products or services, a contract will not be awarded to a contractor that will evaluate its own offers for products or services, without proper safeguards to ensure objectivity."

AT&T, among other firms, submitted a proposal with an OCI mitigation plan. Without evaluating the firm's proposal or OCI mitigation plan, the contracting officer conducted an OCI assessment and determined that, since one of AT&T's affiliates provides IO products and services similar to the types of products in use by the Navy and to be evaluated under the RFP, AT&T would be "in a position to favor its own products and capabilities and disfavor its competitor's products." The contracting officer concluded that AT&T had an "impaired objectivity" OCI and informed AT&T that the terms of the solicitation required its disqualification from the procurement.

AT&T protested its elimination from the competition. AT&T contended that the agency improperly failed to consider the OCI mitigation plan included in its proposal; unreasonably concluded that the firm would evaluate its own products, even though the agency does not subscribe to AT&T's network's products and services; and improperly failed to give the firm notice of and an opportunity to respond to the agency's OCI concerns before being disqualified.

Was AT&T's proposal properly eliminated from the competition:

(a) in accordance with the terms of the RFP?

(b) in accordance with the requirements of the FAR?

B1 – Who Decides? (Act One)

The Army Corps of Engineers issued design/build contracts for a hospital at Fort Benning. In June 2007, the Corps awarded a "design" contract to HOK, a subsidiary of AECOM, to assist the Corps with the preparation of technical design provisions, as well as the technical review of "build" proposals. A year later, in June, 2008, the Corps issued the "build" RFP and received proposals from Harbert JV, McCarthy JV, and Turner (teaming with subcontractor Ellerbe).

Meanwhile, in May 2008, Ellerbe, Turner's subcontractor, had put itself in play for possible acquisition, and HOK's parent company, AECOM, was one of five firms that executed confidentiality agreements with Ellerbe in support of negotiations for a possible acquisition. In June, AECOM conducted a "due diligence" investigation of Ellerbe, and in September AECOM submitted a non-binding letter of interest. Discussions continued until November, at which time discussions were terminated and the deal was considered to be dead.

In August 2008 the Corps held an industry forum to inform potential offerors about the upcoming contract. An AECOM VP (with responsibility for overseeing the HOK design contract) attended the forum and learned for the first time that Ellerbe had expressed an interest in the project. The VP was one of the few AECOM employees who knew that AECOM had been in confidential negotiations to acquire Ellerbe. After the forum he asked his supervisor about the potential for a conflict of interest if AECOM acquired Ellerbe, but the supervisor indicated that negotiations with Ellerbe "had not been productive." AECOM did not communicate any concern to the Corps.

In February 2009, three months after AECOM/Ellerbe negotiations were terminated, the Corps' Project Manager asked the AECOM VP whether any potential OCI's existed. After inquiring within AECOM, the VP reported to the Project Manager that only "teaming relationships" existed.

In April 2009, HOK concluded its work preparing the technical provisions of the solicitation. AECOM was not in negotiations with Ellerbe at that time.

In May, 2009, negotiations between AECOM and Ellerbe resumed, and continued through October. On Jul 21, 2009, the AECOM VP learned that negotiations with Ellerbe had resumed. He immediately informed the Corps' CO, and Army counsel, that AECOM was in negotiations to purchase a subcontractor to "one of the offerors." The VP disclosed that AECOM's interest in purchasing "the subcontractor" dated from before the industry forum, but had been dormant until recently. The VP said that he was bound by a non-disclosure agreement not to disclose the identity of the subcontractor and that he was the only person on the HOK/AECOM Technical Evaluation Team who was aware of these confidential

negotiations, and proposed his own recusal from participation in the Technical Review Board.

The CO thoroughly reviewed the facts, noting that the AECOM vice president was the only member of the Evaluation Team who was aware of the negotiations, and that he had not reviewed the proposals. The CO concluded that thus far no OCI's had tainted the procurement process and determined that the VP's recusal from any involvement with the Technical Review Board would avoid any potential future conflict of interest.

The Technical Review Board, which included four HOK/AECOM employees (out of 34 Board members), completed its work in July 2009. The source selection authority reviewed the Board's recommendation and decided to award the contract to the Turner team (which included Ellerbe as a subcontractor). The Corps made the award September 28, 2009.

Meanwhile, the AECOM/Ellerbe negotiations were fruitful. Ellerbe's directors approved a merger with AECOM on October 7, 2009, obtained shareholder approval, and announced the merger on October 23, 2009.

Both Harbert and McCarthy protested the award to the GAO on the grounds that Turner/Ellerbe had, and did not properly mitigate, all three types of OCI's.

(a) Did Ellerbe have an OCI?

(b) If so, which type(s) of OCI was it?

(c) If so, was the OCI properly mitigated?

B1 – Who Decides? (Act Two)

The GAO sustained the allegations that Turner/Ellerbe had both an unequal access to information OCI and a biased ground rules OCI, and recommended that the agency eliminate Turner/Ellerbe from the competition and make a new award determination.

After considering its options, the Corps decided to follow GAO's recommendation rather than waive the OCI's. The Corps stripped Turner of the contract and began re-procurement. Turner filed a bid protest in the Court of Federal Claims, challenging the Corps' decision.

(a) What is the Court's role in "reviewing" a GAO decision; under what circumstances can an agency's decision to follow a GAO bid protest recommendation be reversed?

(b) Was the Corps' decision to follow GAO's recommendation "arbitrary and capricious?"

C1 – The Chief of Staff

TRICARE is a managed health care program implemented by the Department of Defense for active-duty and retired members of the uniformed services, their dependents, and survivors. TMA is the DOD field activity which is responsible for awarding and managing TRICARE contracts.

On March 24, 2008, TMA issued an RFP for a "best value" award of the third generation of Managed Care Service contracts, referred to as T-3. TMA received proposals from Health Net (the incumbent contractor) and Aetna. Ultimately, the Source Selection Authority selected Aetna for award.

Health Net protested, contending that Aetna should be excluded from the competition on the grounds that it had an unfair access to information OCI because it had used, on its T-3 proposal team, an individual who had been TMA's former Chief of Staff between early 2005 and March 2007. Health Net contended that the former Chief of Staff had access to non-public source selection sensitive information about the T-3 procurement and relevant non-public proprietary information with respect to Health Net's performance of its incumbent contract.

[Note: For purpose of this analysis, assume that the former Chief of Staff has complied with the post-employment restrictions contained in the Procurement Integrity Act and 18 U.S.C. 207 – i.e., that he was not legally prohibited from being hired by Aetna and that he did not "represent" Aetna back to the government on any matter that he had been personally and substantially involved in or that was under his jurisdiction.]

Should Health Net's protest be sustained?

C2 – Was There Inside Information?

The Army issued an RFP for translation and interpretation services at Guantanamo Bay, Cuba (GTMO). Offerors were advised that the agency intended to make award to the firm submitting the proposal deemed to offer the "best value" to the government.

Proposals were submitted by Chenega and Calnet.

Prior to award, Chenega communicated to the CO its concern that Calnet had hired an individual that had worked as a contracting officer's technical representative at GTMO. Chenega was concerned this individual might have had access to invoices Chenega submitted under its incumbent contract, and might have provided this information to Calnet for use in preparing its cost proposal. The CO conducted an investigation and concluded that there was no possibility that the individual could have had access to information that could have provided Calnet with a competitive advantage.

Calnet was selected for award. Chenega protested on the grounds that Calnet had an unequal access to information OCI.

Should Chenega's protest be sustained?

D1 – The Pulled Punches

DEA issued an RFP seeking proposals for an Enterprise Management Services (EMS) contract to provide consolidated IT and O&M services for all DEA offices. . According to the RFP, the DEA enterprise was comprised primarily (though not exclusively) of the Firebird IT System (FITS), which provides a desktop environment from which DEA users access applications and networks resources. SRA was the FITS support contractor, providing engineering support, development support, integration and performance support, and infrastructure engineering.

NGS and SRA submitted proposals, with OCI mitigation plans. After reviewing their OCI mitigation plans, the Contracting Officer (CO) determined that there were sufficient safeguards in place to mitigate potential OCIs for both offerors, and determined that SRA had submitted the "most advantageous" proposal.

NGS protested, claiming that SRA as EMS contractor would have an impaired objectivity OCI associated with its review of designs prepared by SRA itself as the FITS contractor. As the EMS O&M contractor, SRA would be required to participate in integrated project teams which are intended to ensure that the delivered IT capability is aligned with DEA's business and functional requirements. The EMS contractor would review and provide input from the O&M perspective on engineering design solutions crafted by the FITS (and other) DEA contractors, and provide configuration reviews of equipment furnished by the FITS contractor. NGS argued that it would not be in SRA's interests as the EMS contractor to provide negative feedback in its review of solutions proposed by SRA as FITS contractor, since repeated criticism could adversely affect SRA's standing with DEA, affecting past performance evaluations and future competitions. Therefore SRA could "subconsciously pull its punches" when providing the DEA with the EMS perspective on SRA's FITS designs.

In accepting SRA's OCI mitigation plan, the CO recognized that the EMS contractor would provide input from the "O&M perspective" on design solutions crafted by the FITS DEA contractor. The CO nevertheless determined that SRA's performance of the FITS contract would not create an "impaired objectivity OCI" because: (1) SRA would not be in a position to evaluate or assess its own work on the FITS contract; (2) SRA as FITS contractor would not benefit from actions it might take as the EMS contractor since the FITS contractor would not receive additional work implementing its proposed solution; (3) input from the EMS contractor regarding systems engineering solutions proposed by the FITS contractor would be limited to participating in meetings that would occupy only a relatively small portion of the EMS contractor's overall contract effort; (4) all systems engineering work would be subject to oversight and control by DEA personnel; and (5) if the government concluded additional measures were necessary, SRA would create an organizational/financial and informational firewall between its EMS and FITS personnel.

Should NGS' protest be sustained?

E1 – No Good Deed Goes Unpunished (Part One)

In 1992, under its Recreational Partnerships initiative (RPI), the Corps of Engineers awarded a contract to Basile Corp. to assess recreational development potential at 460 sites, prepare feasibility reports for 38 sites, and prepare an implementation strategy for private sector development.

In 1994, the Corps considered modifying Basile's contract to add development of seven identified potential RPI sites. The contracting officer's representative (COR) asked Basile to submit a proposed statement of work and cost estimate. Basile submitted a proposed SOW that identified 25 tasks to be performed by either the contractor or the government, along with the estimated cost for the 14 tasks to be performed by the contractor.

Instead of modifying the existing contract, the COR prepared a memo requesting that the services be acquired from Basile on a sole source basis. This memo included an SOW with the 25 tasks identified by Basile, using Basile's SOW almost verbatim. The memo also included a government cost estimate which matched Basile's estimate for the 14 contractor tasks. The sole source request was not approved, however. Instead, the Corps issued an RFP for full and open competition for a firm fixed price contract that included an SOW with 25 tasks almost verbatim from Basile's earlier SOW.

Several qualified proposals were submitted in response to the RFP, but only Basile's proposal was considered "outstanding." One of the cost evaluators felt that Basile was the only offeror that appeared to fully understand the RFP requirements, and requested the government estimate (which had not been provided to the cost evaluators). The COR provided the government estimate that he had prepared for the earlier request for a sole source procurement, which were identical to Basile's proposed prices.

This led to an investigation by the Army's Criminal Investigation Command. It was determined that the COR had used Basile's SOW for the description of the 25 tasks in the RFP's SOW and Basile's cost estimate for the government cost estimate. The CO was unaware of this when the RFP was issued and evaluations performed. When he learned this, the CO determined that, since Basile had prepared the work statement used in this RFP, an OCI existed that prohibited Basile from providing these services, and she eliminated Basile from the competition.

Basile protested its exclusion on the grounds that its work under the 1992 contract did not give it an unfair advantage because it was performed in contemplation of a contract modification, not a competitive solicitation.

Should Basile's protest be sustained?

E2 – No Good Deed Goes Unpunished (Part Two)

Under contract with NASA, Ressler, Inc. (Ressler) was providing scientific and engineering support in the design, development and testing of remote sensors and sensor systems. Toward the end of the contract performance period the COTR responsible for drafting the SOW for the follow-on solicitation asked Ressler to prepare a description of its personnel and descriptions of tasks it performed under its current contract. Ressler did so.

The RFP for the follow-on contract was issued. It contemplated the award of a 5 year contract for the development and design services being performed by Ressler. Unbeknownst to the CO, the COTR used the documents prepared by Ressler in the RFP's statement of work.

Only Ressler and 3 other firms submitted proposals. Proposals were evaluated by a technical evaluation panel, which determined that only Ressler's proposal was technically acceptable.

As a result of an inquiry by the Office of Inspector General (OIG), the Contracting Officer (CO) learned for the first time that in preparing the RFP the COTR had used the documents prepared by Ressler. Upon learning of the OIG's findings, the CO determined that Ressler had been afforded an unfair competitive advantage since it had the opportunity to write the statement of work to favor its own capabilities. The CO was also concerned that Ressler's statement of work was overly restrictive, as evidenced by the limited response to the solicitation and the fact that only Ressler's proposal was found technically acceptable. The CO therefore determined that Ressler should be disqualified from the competition based on an OCI, and notified Ressler to that effect. Since NASA was then left without any acceptable proposals, it canceled the RFP.

Ressler filed a protest, claiming that (a) it was directed by the COTR to write the task descriptions for the work statement and was not aware that they would be used to write the RFP; and (b) it was asked to document the existing SOW, not to prepare recommended specifications for the follow-on procurement.

Should Ressler's protest be sustained?