



## Update on Procurement-Related Cases

Kym Nucci  
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## For 7 Months, Protests Against Civilian Agency Task Order Awards Were Allowed

- As a result of Congress' failure to extend the May 27, 2011 "sunset provision" in 41 USC § 4106(f) and GAO's June 2011 decision in Technatomy Corp., protests concerning task order competitions by civilian agencies were no longer statutorily restricted for a period of seven months. Curiously, Congress had extended the "sunset provision" to September 30, 2016 in the companion statute applicable to DOD and NASA procurements
- Congress finally fixed the problem with the passage of the National Defense Authorization Act for FY 2012 on December 31, 2011

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## OCI Protests on the Rise

- *Turner Construction Co., Inc. v. United States*
  - U.S. Court of Appeals for the Federal Circuit affirmed the COFC's decision holding that Army's decision to follow a GAO recommendation to terminate a contract awarded to Turner and to exclude Turner from consideration of the new award because of an OCI was unreasonable. Both courts held that the GAO's determination was based on suspicion and innuendo rather than "hard facts"
- Numerous protests involving OCI issues since the *Turner* decision was issued

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### OCI Protests on the Rise

- *NETSTAR-1 Government Consulting, Inc. v. United States*, 101 Fed.Cl. 511 (2011)
  - COFC sustained a protest against a DHS award of a blanket purchase agreement to Alon, Inc. because the contracting officer improperly delayed the identification of the potential OCI contrary to FAR requirements and the "hard facts" showed that Alon had a significant OCI
- *VSE Corporation*, 2011 CPD ¶ 268
  - Successful protest against Army's termination of a contract awarded to VSE because CO determined there was an appearance of impropriety
  - GAO determined that the CO had relied on assumptions, rather than the "hard facts," and an incorrect understanding of the statutes and regulations applicable to post-government employment activities

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### OCI Protests on the Rise

- *TeleCommunication Systems, Inc.*, 2011 CPD ¶ 229
  - GAO denied a protest challenging the agency's termination of the protester's contract on the basis that the protester's hiring of a former high-level agency employee created an appearance of impropriety that may have caused an unfair competitive advantage

**THE TAKEAWAY:** Because of the growing scrutiny on conflict situations, contractors should: 1) educate themselves about the OCI rules, 2) be increasingly vigilant in recognizing actual or potential conflicts, and seek ways to mitigate OCI risks at the earliest possible time

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### Federal Supply Schedule ("FSS") Procurement Issues

- *Rapiscan Systems, Inc.*, 2010 CPD ¶ 60
  - Reaffirmed that all required items in a solicitation must be included in a vendor's FSS contract, with the exception of items that do not exceed the micro-purchase threshold of \$3,000
- *Brooks Range Contract Services, Inc.* unsuccessfully alleged that a CTA was a joint venture
  - Both the GAO and the COFC rejected the protester's allegation that the challenged contractor team arrangement ("CTA"), which complied with the mandatory requirements at GSA's website and with the applicable solicitation, was a joint venture entity that was ineligible for award because it did not have its own separate FSS contract

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**Federal Supply Schedule (“FSS”) Procurement Issues**

**THE TAKEAWAY:** When competing on a FSS procurement, consider entering into a CTA with another FSS contract holder to maximize your competitive position, particularly when all of the required items are not on your FSS contract

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**Developments Related to SDVOSB Set-Aside Procurements**

- *Aldevra* Protests, 2011 CPD ¶ 183 and 2012 CPD ¶ 112
  - The GAO determined that, before using the FSS, the Department of Veterans Affairs (“VA”) is statutorily required to conduct market research to determine if the procurement should be restricted for service-disabled, veteran-owned small business (“SDVOSB”) concerns and must set aside the procurement for SDVOSBs if the prerequisites are met.
  - The VA refused to follow GAO’s recommendations to cancel the FSS procurements and conduct the required market research

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**Developments Related to SDVOSB Set-Aside Procurements**

- GAO confirmed that SDVOSB concerns, including joint ventures, must be listed in the VA VetBiz Vendor Information Pages database to be eligible for award of a VA contract (*A1 Procurement*, JVG, 2011 CPD ¶ 140, and *Pro South-Emcon, a Joint Venture*, 2011 CPD ¶ 162)
- SBA’s Office of Hearings and Appeals (“OHA”) issued a decision last year reversing its 2007 and 2009 decisions, which had held that a SDVO joint venture structured as a separate legal entity could not qualify as a SDVOSB concern because a SDVOSB concern must be directly owned and controlled by a service-disabled veteran

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**Developments Related to SDVOSB Set-Aside Procurements**

- Now, a joint venture consisting of a SDVOSB concern and a non-SDVOSB concern is eligible to compete on a SDVOSB set-aside procurement provided the requirements at 13 CFR §125.15(b) are met. *Construction Engineering Services, LLC*, SBA No. VET-213 (2011)

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**Developments Related to SDVOSB Set-Aside Procurements**

- Two recent OHA decisions confirmed that a SDVOSB joint venture agreement must name the SDVOSB concern as the managing venturer and must identify by name the SDVOSB employee who will serve as the project manager (*Hane-JV*, SBA No. VET-227, and *Rush-Link One Joint Venture*, SBA No. VET-228)
- **THE TAKEAWAY:** Non-SDVO small businesses may joint venture with SDVOSBs on a SDVOSB set-aside procurement, but make certain that the joint venture agreement complies with the requirements at 13 CFR § 125.15(b)

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**Word of Caution Regarding Joint Venture Agreements**

- Recent decision by a SBA Area Office related to Mentor-Protégé Program rules – to receive the benefit of the “non-affiliation” rule, a joint venture must meet the requirements of 13 CFR § 124.513(c) with respect to both 8(a) and non-8(a) procurements
  - Because the joint venture team did not carefully draft their JV agreement to comply with the regulatory requirements, it lost what could have been a lucrative construction contract

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