

In Archimedes Bid Protest, Government Contractor Takes on Herculean Task of Challenging the Agency's OCI Determination, and Wins

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Earlier this month, the Government Accountability Office ("GAO") sustained a bid protest challenging the agency's decision to exclude the protester from consideration based on a potential organizational conflict of interest ("OCI"). The GAO decision serves as a reminder that an offeror that is excluded from a competition on the basis of a perceived OCI can challenge that decision in a protest before GAO. And although GAO will give the agency a fair amount of deference, it will nonetheless sustain a protest where it concludes that the agency's decision was unreasonable.

In the *Archimedes Global* [bid protest](#), the contractor submitted a proposal to perform services in response to a solicitation issued by the Department of Homeland Security. The solicitation included a clause permitting the agency to disqualify the incumbent contractor from competing for follow-on work because the predecessor contract required the incumbent to have access to non-public, procurement sensitive information. Archimedes' proposal listed as key personnel two program managers currently working for the incumbent. And for that reason, the agency excluded Archimedes from consideration based on the grounds that those employees could have provided Archimedes with unequal access to information.

The GAO found that the agency's decision to exclude Archimedes was unreasonable. Case law requires that an agency's identification of a disqualifying conflict of interest be based on "hard facts," not the "mere inference or supposition" of a conflict of interest. "Chief among" the GAO's concerns was that the agency, without any underlying evidence, concluded that because there was a possibility of the employees having access to non-public information, the employees necessarily provided that information to Archimedes. But the record before the GAO showed that the incumbent's employees did not participate in preparing Archimedes' proposals and, even though one employee theoretically could have obtained non-public information, that employee did not do so.

The *Archimedes* case is somewhat unusual in two respects. First, most OCI-related protests arise when a protester challenges the agency's decision to award a contract to a competitor alleged to have an OCI. It is less common for a protester to challenge an agency's conclusion that the protester itself has an OCI. Second, for the past number of years, in the wake of the Federal

Circuit's decision in [Turner Construction](#), GAO and the U.S. Court of Federal Claims generally have been quite deferential to agency OCI determinations.

A key takeaway from *Archimedes* is that, despite that general deference, agency discretion has its limits. If an offeror believes that an agency's OCI determination was not reasonable or supported by "hard facts," the offeror can seek relief via a protest.

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