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Organizational Conflict of Interest and the Air Force  
Contract Augmentation Program: A Patterned Approach to Risk  
Identification

by

Dennis W Rogers, GS12

A Research Report Submitted to the Faculty

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Advisor: Dr. Fred P. Stone

Air Command and Staff College  
Maxwell Air Force Base, Alabama

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# TABLE OF CONTENTS

	<i>Page</i>
DISCLAIMER .....	i
TABLE OF CONTENTS.....	ii
LIST OF FIGURES.....	iii
ABSTRACT.....	iv
INTRODUCTION .....	1
BACKGROUND/PROBLEM .....	4
OCI .....	4
AFCAP .....	5
GAO and OCI Protests .....	8
ANALYSIS: OCI PROTEST MEASUREMENTS.....	12
RESULTS: GAO PROTEST INDICATORS in AFCAP.....	18
The Effects of No Hard Facts .....	18
Top Level OCI Trends.....	19
High Risk OCI Type I .....	20
High Risk OCI Type II .....	21
OCI Consideration: Expectation vs Reality.....	23
RECCOMENDATION .....	24
The AFCAP Customer Role.....	24
The AFCAP Contractor Role .....	25
The DoD Role.....	26
CONCLUSION.....	27
BIBLIOGRAPHY.....	29

**LIST OF FIGURES**

Figure 1: Number of OCI protests by year.....13

Figure 2: Time of OCI protest.....14

Figure 3: OCI by type.....14

Figure 4: OCI protest outcomes.....15

Figure 5: OCI Protest denial reasons.....16

Figure 6: OCI Protest sustainment reasons.....17

Figure 7: Contracted firms by military component.....22



## ABSTRACT

The Air Force Contract Augmentation Program (AFCAP) provides contracted support to sustain operations in the deployed environment. Fraud, waste, and abuse violations in this environment are well documented and costly. A type of fraud, organizational conflict of interest (OCI) is the subject of greater scrutiny in the acquisition community. AFCAP contracting officers lack management controls to identify OCI as required by regulation. Conditions suggest AFCAP is predisposed to OCI occurrence and contractors are not incentivized to devote necessary resources to identify OCI.

One hundred thirty eight OCI protest cases adjudicated by the Government Accountability Office were reviewed to collect data from the protest outcomes. This data was charted to determine elevated accusation of OCI type, frequency, and disposition in the GAO protests. The patterns the data presented were applied to the AFCAP program to evaluate its OCI susceptibility in conjunction with conditions inherent in the program.

This evaluation concludes that AFCAP is at increased risk to two types of OCI: unequal access to information and impaired objectivity. To counter this, three recommended process improvements include increased accountability from the customer, demanding transparency from the contractor, and the exploration of flexible reporting through existing systems by the DoD.

## INTRODUCTION

A complex relationship exists between wartime contracts, satisfying mission requirements, and their oversight. The immediate need for support requires accelerated action, often at the expense to fiscal stewardship. Post-performance contract audits indicate the need for better management processes and oversight.<sup>1</sup> The sheer number of those involved in the acquisition process and the money expended, results in Fraud, Waste, or Abuse (FWA) opportunity in greater abundance than all other USAF functional areas.<sup>2</sup>

Contract augmentation program (CAP) contracts provide commanders a timely mechanism to support wartime operations. The scope of services available under CAP arrangements is increasingly broad. The most recent Air Force CAP (AFCAP) IV contract made 44 services available which ranged from airfield management to food service support. The contract ceiling of AFCAP IV allows for up to one billion dollars in contract performance each year. Each military component fields its own version of a CAP contract with high dollar contract ceilings and expansive scopes of service.

The 2011 Commission on Wartime Contracting in Iraq and Afghanistan (CWC) discovered that between fiscal years 2002 to 2011 “waste and fraud together ranged from \$31 billion to \$60 billion.”<sup>3</sup> Oversight agencies including the Special Inspector General for Afghanistan Reconstruction and the CWC have found numerous incidences highlighting misconduct, collusion, and inept oversight.<sup>4</sup> Post-performance audits have identified that these types of indecencies occurred on CAP type contracts in Iraq and Afghanistan.<sup>5</sup>

CAP contracts are prone to FWA due to the wartime environments in which they operate. The DoD IG listed “oversight and surveillance” as the number one systemic contracting problem

area in contingency contracting.<sup>6</sup> The deployment mechanism creates a constant turnover of those appointed in oversight positions, compromising continuity of oversight. There are multitudes of ways FWA can occur in these contracts. Organizational Conflict of Interest (OCI) is a type of fraud that primarily offends by influencing the procurement award process and can increase contract cost and delay programs. The CWC in addressing OCI, “suggest that the urgency of contingency operations requires a vigilant and effective risk-identification, risk-mitigation, and OCI-enforcement process.”<sup>7</sup> The Secretary of the Air Force Inspector General (SAF/IGQ) has said, “The key to prevention, detection and reporting of FWA is the recognition of conditions that allow exploitation of management controls.”<sup>8</sup> This guidance provides the intent for this research which will evaluate OCI protest data to determine the areas in AFCAP IV that are prone to abuse.

This paper will utilize the evaluation methodology to analyze occurrences of OCI protested to the GAO. It will examine outcomes of the protests to determine which OCI violations occur more frequently, where they occur, and what conditions contribute to the violations. The pattern the OCI violations present will be applied to the CAP lifecycle to expose high risk areas for OCI infraction. The results of this research will aid contracting officers and acquisition professionals in OCI risk-identification. It will contribute to answering a problem Dr. M. A. Thomas states in the Defense Acquisition Review Journal, “little attention has been paid to the question of how contracting officers are to obtain the information necessary to identify an OCI in the first place.”<sup>9</sup>

This paper will also provide background on OCI and the current problem of risk-identification in acquisitions. It will then deliver detail on the contract arrangement of the AFCAP program and the conditions that make it vulnerable to FWA. The GAO role in OCI

adjudication and the implications of OCI protest in the AFCAP contract will be reviewed. An evaluation of GAO adjudicated OCI cases will be presented explaining how occurrences were captured to determine where and with what frequency they were identified. The pattern of violations will be compared to the AFCAP contract to identify which areas are at highest risk of future violation. The results of this evaluation will be accompanied by recommendations for risk-identification in high-risk areas of occurrence.

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<sup>1</sup> Commission on Wartime Contracting, *Transforming Wartime Contracting; Controlling costs, reducing risks*, 6

<sup>2</sup> SAF/IGQ, *Inspector General Guide to Fraud, Waste, or Abuse Awareness*, 13.

<sup>3</sup> Commission on Wartime Contracting in Iraq and Afghanistan, *At what risk? Correcting over-reliance on contractors in contingency operations*, 16

<sup>4</sup> Commission on Wartime Contracting, *Transforming Wartime Contracting; Controlling costs, reducing risks*, 90; Sopko, Speech to Weill Cornell Medical College;

<sup>5</sup> Commission on Wartime Contracting, *Transforming Wartime Contracting; Controlling costs, reducing risks*, 79.

<sup>6</sup> DODIG, *Contingency Contracting: A Framework for Reform-2015 Update*. Washington, V.

<sup>7</sup> Commission on Wartime Contracting, *Transforming Wartime Contracting; Controlling costs, reducing risks*, 51.

<sup>8</sup> SAF/IGQ, *Inspector General Guide to Fraud, Waste, or Abuse Awareness*, 3.

<sup>9</sup> Thomas, *Identifying Organizational Conflict of Interest*”, 267.



## BACKGROUND/PROBLEM

### OCI

The GAO has provided categorization of OCI into three specific types.

1. “Unequal access to information” occurs when a contractor gains competitive advantage through non-public information due to its performance on other contracts.
2. “Biased ground rules” explains a situation in which a firm, through performance in other Government contracts, participates in development of future Government requirements.
3. “Impaired objectivity” is the result of situations where a firm could be in a position to evaluate its own performance due to its incumbency on another Government contract.<sup>10</sup>

The overarching implication of these types of OCI is that when firms are in a position to internally police their own activities, the potential for OCI infraction increases.

Violations of OCI are on the rise as evidenced by the number of GAO OCI bid protest cases filed since 2000. Of the 220 cases returned by a GAO website search, 144 have occurred since 2010 representing 65 percent of the cases in slightly greater than a six year span. According to expert legal opinion, there are conditions that may contribute to increased OCI occurrence. The general theme of the opinion is that fewer companies are providing a greater amount of goods and services to the government as a result of industry consolidation where firms are frequently buying out competitors or creating new divisions.<sup>11</sup> This can create scenarios where a company may buy-out a competitor engaged in a government contract and subsequently gain procurement intelligence it did not previously possess.<sup>12</sup> The opinion also notes the increased use of contracts with wide scopes of service where firms are incentivized to persuade the government to include new requirements under those existing contracts.<sup>13</sup> Consideration of the types of OCI in conjunction with the state of industry and how these relate to a potential procurement is the responsibility of the contracting officer.

Federal Acquisition Regulation (FAR) section 9.504 compels contracting officers to identify, evaluate, avoid, neutralize, and seek the advice of legal counsel or experts when contemplating OCI in relation to an acquisition.<sup>14</sup> In the same section, they are advised to avoid creating delays, burdensome information requirements, and excessive documentation.<sup>15</sup> The section details specific unallowable scenarios that fall into the three classifications of OCI detailed above. Finally, it provides direction for clauses tailorable by the individual federal agencies for inclusion into contracts with the purpose of compelling firms to self-identify OCI.

The issue with OCI identification is that it can occur in different phases of the acquisition process in a variety of ways. This ambiguity makes the policy approach of levying responsibility and limiting time and resources of little practical value to OCI identification for the contracting officer. The primary tool at the contracting officer's disposal is a contract clause that requires a firm to self-identify implied or apparent OCI. However, if the firm fails to do this, the result is often a resource consuming contract protest brought by a competitor or unrecognized FWA. Contracting officers require methods and tools they can use to proactively prevent OCI in order to enable them to comply with the FAR mandate.

## **AFCAP**

The original AFCAP contract was established in 1997 as a sole-source award. AFCAP IV, the current master contract was awarded in June 2015 to eight contractors. It is a multiple-award indefinite-delivery, indefinite quantity (IDIQ) \$5 billion arrangement with one base year and four option years of performance. Work done under AFCAP must be in support of contingency response or emergency situations and is available for use to the entire federal government. The purpose of an IDIQ contract is to create a master award which pre-qualifies and binds capable contractors. Once awarded, only those contractors compete for individual

requirements which are issued as task-orders under the master contract. This process eliminates the requirement of publicly posting task-order proposal requests and shortens contractor vetting, leading to a streamlined award process.<sup>16</sup> The IDIQ contract structure is essential for meeting the emergency needs AFCAP is designed to serve.

The process of awarding task-orders is largely the same as the award of the master contract with the exception of the streamlining benefits mentioned above. Statement of Work (SOW) development begins at the deployed location and routes to the AF Civil Engineering Center at Tyndall AFB, FL where program managers and engineers assigned to AFCAP help to refine the SOW to the clarity required for the contracting officer to solicit proposals.<sup>17</sup> The request for proposal is sent to the eight AFCAP firms who submit bids and compete amongst each other for contract award. Following evaluation, an award is made to the firm that best meets the evaluation factors, and the pre-award phase is completed.

The post-award phase concerns the insurance of performance under the terms of the contract through contract administration. The majority of the contracting officer's effort is spent validating that levels of quality and timeliness required by contract are received and that the contractor is properly compensated for its performance.<sup>18</sup> Performance often includes changes to levels of effort which leads to contract modification. A firm awarded the task of providing food services should receive an equitable adjustment if the USAF decided to deploy a significant number of personnel not initially conceived at task-order award. Conversely, if levels of service decreased, a negative contract adjustment could be expected. The pre and post-award phases of the task-order lifecycle contain conditions where OCI can influence procurement outcome.

To address this, the AFCAP IV contracting officer included AF FAR clause 5352.209-9000, *Organizational Conflict of Interest* (OCT 2010) and H005, *Conflicts of Interest* in the

master contract.<sup>19</sup> H005 contains language that disallows contractor activities that would violate the three types of OCI. The firm is compelled to self-identify potential OCI and submit a mitigation plan on all task-orders where it may exist. Where OCI cannot be mitigated, the firms agree to withdrawal from the affected task-order competition. As enforcement, “violations of this clause may have consequences ranging from award fee decrements, contract termination, suspension or debarment, or other appropriate remedies or administrative actions.”<sup>20</sup> Clause 535.203-9000 is also directed at restricting a contractor from any organizational alignment that may cause OCI but contains the language, “The Contracting Officer shall identify the organizational conflict of interest in each (task) order.”<sup>21</sup> This can be read as two clauses assigning responsibility to the contracting officer and the firm, or two clauses sending mixed signals on who is responsible.

From a macro risk perspective, the AFCAP contract operates in a set of conditions the DoD IG said has “greater potential for violations of law, regulations, and contract terms.”<sup>22</sup> The US Army Logistics Civil Augmentation Program (LOGCAP) operates in the same environment, where the former Chief Executive Officer of one its contractors recently pled guilty to conspiring to defraud the government over a 20 year period.<sup>23</sup> At the micro risk level, firms that participate in AFCAP IV have similar corporate constructs to firms cited as a potential cause for recent increases in OCI. CH2M Hill is an AFCAP IV firm who according to its most recent 10-K filing with the Securities and Exchange Commission has acquired components of Booz Allen Hamilton, all interests in Halcrow Holdings, and components of TERA Environmental Consultants, in the last 5 years.<sup>24</sup> DynCorp International, FLUOR-AMEC, and KBR represent other firms involved in AFCAP, each possessing multiple business units which provide goods and services across government.

These conditions coupled with the passive approach of firm self-identification as instructed by clause H005 do not appear to meet the level of vigilance required to prevent FWA as advised by the CWC. There is concern that the offeror's organizational complexity and associated subcontractor relationships prevent it from understanding its own OCI susceptibility.<sup>25</sup> These conditions coupled with an active approach directed in clause 535.203-9000 better meet that intent, but a lack of tools for active identification limit the contracting officer's ability to be compliant.

### **GAO and OCI Protests**

The GAO operates on behalf of Congress and issues legal decisions on bid protests.<sup>26</sup> OCI contract protests adjudicated by the GAO provide detailed information on the type of OCI raised and disposition on resolution. This information is valuable for discerning what constitutes founded and unfounded accusations of OCI and whether the contracting officer adhered to FAR policy.

Protests can be filed by interested parties who are defined as "actual or prospective offerors whose direct economic interest would be affected by the award of a contract or by the failure to award a contract."<sup>27</sup> When protesting OCI, interested parties contend that the awardee failed to disclose a specific type of OCI, that OCI affected the award decision, or that the agency failed to properly mitigate OCI. In minimal cases, firms have protested agency decisions that removed it from contract contention when the agency determined its OCI could not be mitigated.<sup>28</sup> If an agency does not identify or reasonably consider OCI, the GAO protest mechanism is the last opportunity to identify it. By law, interested parties are only granted a 10 day window to protest after contract award.<sup>29</sup> Beyond that point, OCI identification is left to contracting officers, firms themselves, whistleblowers and auditors.

The action of firms policing other firms in regard to OCI would appear to give the system merit. Questions, however, have been raised that firms are protesting for the sake of protesting. In a 2009 report, the Armed Services Committee raised concern that bid protests are increasingly becoming the perfunctory response when a contractor is removed from competition or does not receive the contract award.<sup>30</sup> This is observable in protests where it appears firms file a litany of grievances, some without merit, with the hope that one of the grievances will gain traction and result in a sustained protest. Regardless of intent, which is difficult to identify, these instances contribute to the record and provide insight on the types of situations that can give rise to OCI accusations.

This insight is important because no GAO cases of OCI protest at the CAP task-order level exist. FAR 16.505(a)(10)(i) prohibits protests of task-orders not exceeding \$10 million under IDIQ contracts unless the accusation impacts an increase to the scope, period, or maximum value of the master contract. OCI does not impact these areas and therefore could not be raised for protest unless the task-order exceeded \$10 million. The Federal Procurement Data System – Next Generation (FPDS-NG) database is the principal repository for federal contracting award data. A query utilizing the AFCAP III master award identification numbers shows 61 task-orders exceeding \$10 million considering base award and modifications. Given the number of OCI protests and post award findings of OCI in audits, it is surprising that no AFCAP task-orders have been subject to OCI protest.

Research suggests that “the decision to protest becomes a cost-benefit calculation.”<sup>31</sup> The costs of protesting at the task-order level are high. An accusation of any FWA would likely bring scrutiny upon all firms participating in AFCAP. Future task-orders could be delayed while the protest awaited adjudication. Adjudication could result in application of greater constraints

on the firms. The accusing firm could experience reprisal from other firms in future task-order competitions. These costs would have to be weighed when a firm contemplates protest of a single task-order. Together, the thresholds of the regulation and cost-benefit decision of protest could combine to effectively deter firms from policing other firms at the task-order level. If this is the case, it presents a greater issue because lack of protest threat would decrease a firm's incentive to scrutinize its internal affairs, placing greater responsibility of OCI identification on the contracting officer.

AFCAP contracting officers manage contracts that operate in a high risk OCI environment. The corporate structure of AFCAP firms model those identified as a cause of increase in OCI occurrence. Firms may struggle to recognize their own OCI susceptibility.<sup>32</sup> GAO protest rules and competitor protest aversion could combine to diminish a firm's incentive to actively monitor its OCI susceptibility. DoD IG audit reports show that OCI is occurring on CAP type contracts. These conditions and findings do not instill confidence in the approach of contractor self-identification and the contracting officer cannot rely on it to protect taxpayer interests. An active approach is necessary to identify and prevent OCI. Methods and resources are required to do this effectively but are not readily available. Development requires that contracting officers know what kind of OCI is likely to occur, when it is likely to occur, how frequently it is occurring, and what level of response is required to meet GAO mitigation expectations.

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<sup>10</sup> GAO. Decision, *Matter of International Business Machines Corporation*. Files B-410639; B-410639.2.

<sup>11</sup> Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 2.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> FAR 9.504 (a)(2)

<sup>15</sup> FAR 9.504 (b)

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- <sup>16</sup> FAR 16.505(a)(1)
- <sup>17</sup> Ausink, *Air Force Contingency Contracting: Reachback and Other Opportunities for Improvement* , 53.
- <sup>18</sup> Cibinic, *Administration of Government Contracts*, 1.
- <sup>19</sup> AFICA, *FA8051-15-D-0001*, 47.
- <sup>20</sup> *Ibid*, 32.
- <sup>21</sup> SAF/ACQ, *Policy Memo 10-C-15*.
- <sup>22</sup> DODIG. *Contingency Contracting: A Framework for Reform-2015 Update*, 1.
- <sup>23</sup> United States Attorney's Office, *Former Louis Berger Group Inc. Chairman, CEO, and President Admits 20-Year Conspiracy to Defraud Federal Government*.
- <sup>24</sup> CH2M HILL (2016), *Form 10-K 2016*.
- <sup>25</sup> Thomas, *Identifying Organizational Conflict of Interest*, 267.
- <sup>26</sup> GAO, *About Us*.
- <sup>27</sup> FAR 33.101 Definitions
- <sup>28</sup> GAO, Decision, *Matter of VRC, Inc.*, File B-310100.
- <sup>29</sup> 4 C.F.R. § 21.2
- <sup>30</sup> United States House of Representatives, *Duncan Hunter National Defense Authorization Act For Fiscal Year 2009 Report of the Committee on Armed Services of the House of Representatives on H.R. 5658*, 394.
- <sup>31</sup> Maser, *The Bid Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?*, 9.
- <sup>32</sup> Thomas, *Identifying Organizational Conflict of Interest*, 267.

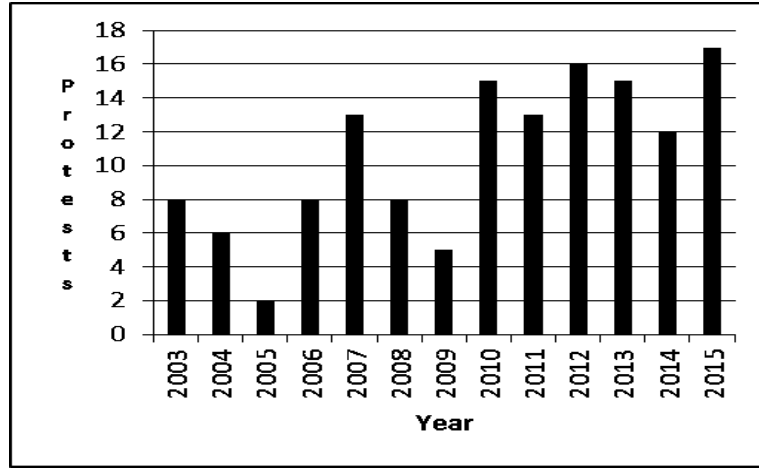


## ANALYSIS: OCI PROTEST MEASUREMENTS

I analyzed OCI protest cases to determine if OCI protest occurrence can provide indicators to high-risk OCI conditions in the AFCAP IV program. The GAO provides bid protest outcomes, and I searched the GAO website using the keyword “Organizational Conflict Interest” refined by “bid protest”. I included OCI protests across all agencies utilizing the logic that identified trends would have application to the AFCAP IV contract because it is subject to the same conditions as the contracts protested. The result produced 220 cases for evaluation although actual assessment revealed 224 cases were returned by the search. There was no apparent explanation for this disparity. The cases ranged in date from August 17, 2000 through April 4, 2016. Analysis revealed that many cases returned by the search did not deal with an OCI protest directly. Cases such as B-407784 in the *matter of Wyle Laboratories*, B-407937 in the *matter of Unispec Enterprises Inc.*, and B-411742.4 in the *matter of Trandes Corporation* are three examples. These cases only mentioned OCI in the text, were not directly related to an OCI protest, and were removed to avoid skewing the results. Additionally, years 2000 to 2002 were removed due to negligible protests and 2016 due to incomplete yearly information. Removal of these groups resulted in 138 OCI cases with adequate content for evaluation. Each case was reviewed for validity and categorized by date, type of OCI, protest time in the acquisition, outcome, and basis for outcome.

Figure 1 demonstrates OCI protests by year. The figure confirms that the number of yearly protests have increased since 2010. It also shows that OCI protests are continuing at a steady rate year over year.

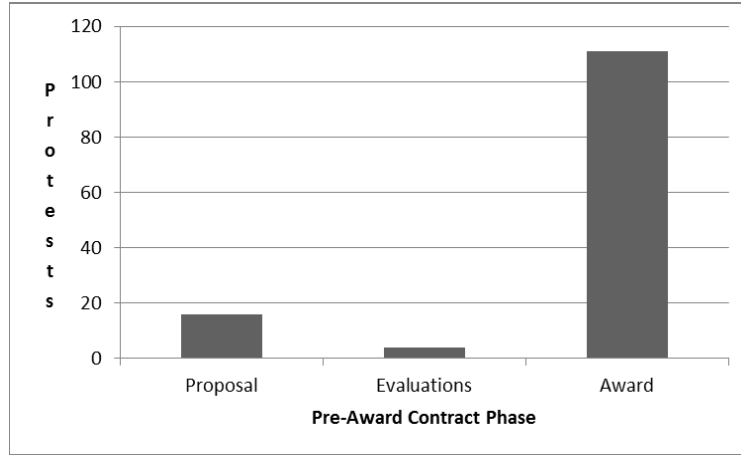
**Figure 1. Number of OCI protests by year**



**Source:** Author analysis of GAO data based on total protests

The point in the pre-award contract phase when the protests were raised is presented in Figure 2. In approximately 85% of the protests, the protestor did not come forward until contract award was announced. Protests during the “Proposal” period were raised at the earliest possible point in the acquisition process. These occurred when bid proposals were requested for requirements and firms believed they had immediate knowledge of OCI offenses. Protests during the “Evaluations” phase were minimal. This is likely due to the fact that a firm would not protest OCI if it received award, and it would be in the firm’s best interest to wait until it had that knowledge. Admittedly, the data visibility for the Figure 2 categorization is limited. Each GAO report is individually written and the author did not always provide exact explanation of when the protestor first became aware of the alleged OCI. This limits insight into when the alleged OCI first became visible to the protestor.

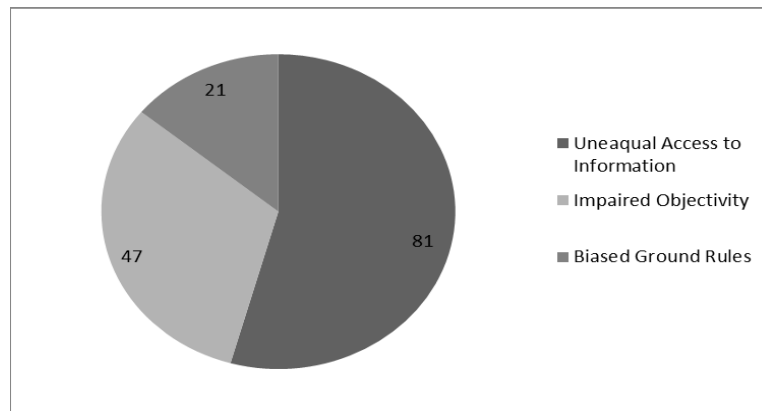
**Figure 2. Time of OCI protest**



**Source:** Author analysis of GAO OCI protest results (2002 – 2015)

Cases were categorized by the type of OCI that was protested. Figure 3 shows “Unequal Access to Information” was the most commonly protested type of OCI followed by “Impaired Objectivity” and “Biased Ground Rules”. In protest cases such as B-401068.4 in the *matter of CIGNA Government Services* and B-401106.5 in the *matter of L-3 Services, Inc.*; multiple types of OCI were raised for protest in the same case. Each type of OCI was addressed individually in the GAO response and one type could have been sustained while another type was denied. For this reason, all types of protested OCI were captured.

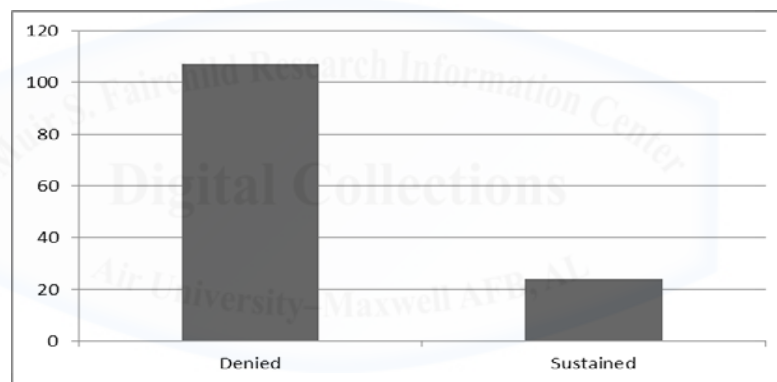
**Figure 3. OCI by type**



**Source:** Author analysis of GAO OCI protest results (2002 – 2015)

The outcome of the OCI protests are presented in Figure 4 and represent the number of protests sustained versus denied over the period. Seven cases were omitted from this calculation because their disposition was dismissed or withdrawn due to circumstances that changed events before final disposition. A sustained protest signifies that the GAO found the protestors claim valid and resulted in a recommendation of corrective action, which stalled the procurement. A denied protest found the protestors claim invalid and allowed the procurement to resume with no negative action. As the figure illustrates, there was an approximately 22% sustainment rate. This is slightly higher than the 20% GAO bid protest sustainment rates for all types of protest.<sup>34</sup>

**Figure 4. OCI protest outcomes**



**Source:** Author analysis of GAO OCI protest results (2002 – 2015)

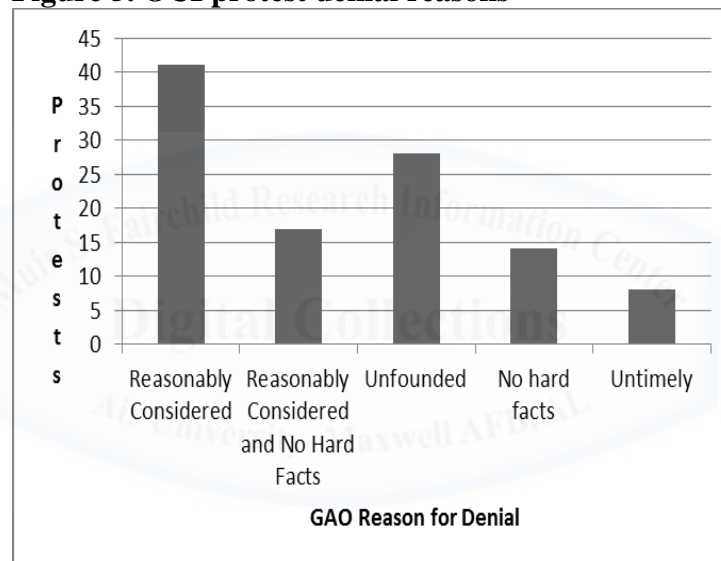
Figure 5 details the breakdown of reasons for protest denial. A denial citing “Reasonably Considered” reflected a GAO decision that the contracting officer reasonably considered OCI mitigation in the case. The GAO has long held that when reasonable documented consideration is demonstrated, it will not substitute its judgement for the contracting officer’s conclusion.<sup>35</sup> A designation of “Unfounded” represents cases where the GAO could find no basis to validate the protestor’s claim. This finding was not cited after 2012.

In 2011, the US Court of Federal Appeals overturned a GAO decision involving OCI where the court found the GAO relied on innuendo and suspicion in its ruling.<sup>36</sup> The court ruled

that OCI decisions must be based on “hard facts”. In response, the GAO ceased to consider OCI allegations that were not accompanied by hard facts from the protestor. This was a major policy shift in that the GAO no longer investigated protests to draw their own conclusions.

“Reasonably Considered and No Hard Facts” represented outcomes where the GAO found the contracting officer addressed the OCI and the protestor did not supply adequate information for consideration. Finally, “Untimely” findings resulted when the protest was not brought by the dates required by law.

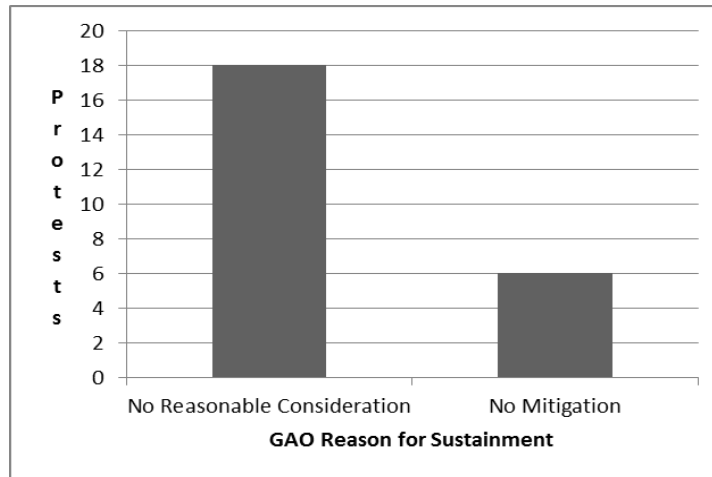
**Figure 5. OCI protest denial reasons**



**Source:** Author analysis of GAO OCI protest results (2002 – 2015)

Protests sustained by the GAO fell into two categories. Figure 6 details the number of protests sustained and are presented by reason. “No Reasonable Consideration” was levied when the contracting officer should have been aware of an OCI problem, but did not put forth the level of effort necessary to identify the conflict. A “No Mitigation” disposition resulted when the contracting officer was aware of the conflict but did nothing to mitigate it. Based on the discussion explaining Figure 5, a sustainment signals that the GAO investigated the claim prior to 2012 and found merit or the protestor supplied hard facts to substantiate the OCI

**Figure 6. OCI Protest sustainment reasons**



**Source:** Author analysis of GAO OCI protest results (2002 – 2015)

<sup>34</sup> Schwartz, *GAO Bid Protests: Trends and Analysis*, 4.

<sup>35</sup> GAO, Decision, *Matter of MASAI Technologies Corporation*, File B-298880.3.

<sup>36</sup> USCAFC, *Turner Construction Co. Inc. V. United States JV*.

## **RESULTS: GAO OCI PROTEST INDICATORS IN AFCAP**

This section discusses the interpretation of the OCI protest data in the context of AFCAP. In its basic contractual form, AFCAP mirrors the structure of the contracts protested to the GAO. Hundreds of task-orders are awarded under AFCAP and the types of protest brought to GAO are all applicable to them. Therefore, heightened occurrence of the component factors of OCI in GAO protest data can indicate areas in AFCAP that may be at high risk to OCI abuse. GAO protest data is being compared to the AFCAP program because it operates in an environment prone to FWA and the AF Inspector General has tasked acquisition professionals to identify conditions that contribute to FWA. A protested OCI is not necessarily an indicator of future offense, especially since there is a high denial rate of OCI protests. The purpose of this analysis however, is to evaluate trends in conjunction with conditions in order to give AFCAP contracting officers a starting point for OCI identification.

### **The Effects of No Hard Facts**

While exploring OCI protest cases, I discovered information that reinforces the importance of this research. The US Federal Court of Appeals decision citing that “hard facts” must be presented with OCI protest accusations limits GAO OCI review. The outcomes of the data show that prior to 2012, a protestor could submit an OCI accusation and the GAO might have investigated the record to determine if it believed OCI existed. After 2012, the GAO declined to investigate OCI when the protestor did not provide direct evidence with its accusation.

This GAO policy shift had major effects. It made the sustainment of an OCI protest harder to achieve for the protestor and relaxed the burden on the agency to ensure it had fully considered OCI identification and mitigation. This is evident in Figure 5 which shows that 23%

of protests since 2012 received no further review due to lack of hard facts. Some or all of this 23% may have been investigated by the GAO prior to 2012. If the protest received no further review, the fact that the agency may not have reasonably considered OCI had no bearing on the outcome. Protest data suggests that industry does not welcome this change. Since 2012, OCI protest cases have not decreased and 31 cases have been denied because protestors failed to produce hard facts. It is unclear why firms continue to bear the expense of litigation with full awareness that the GAO will not consider their claim absent direct evidence. This is likely a welcome policy shift for Government employees involved in a protested contract or a Government customer waiting for services after contract award. Those tasked with minimizing FWA, however, lost insight into OCI protest cases because the GAO does not scrutinize the protests as it did prior to the 2012 court ruling. It makes active identification all the more important to prevent abuse.

### **Top Level OCI Trends**

Contracting officers should expect OCI protests to continue at a high rate. There is no indication that OCI protests numbers are effectively being diminished by current OCI policy which has not been updated since 1984.<sup>37</sup> Therefore, it is in the best of interest of the government that the contracting officer proactively identifies OCI.

Protests were predominantly filed during the award phase of acquisitions. This measurement proved to be of little value. Some GAO decisions cited the point in time when OCI was first observed in the acquisition process and some did not. In cases where it was not cited, the GAO often stated that a firm was not required to protest that a competitor had an impermissible OCI until the award phase.<sup>38</sup> The court ruling that compelled the GAO to require hard facts also contributed to this lack of clarity. If the GAO denied the protest on those



grounds, no additional consideration was given. The information presented in Figure 3, OCI by type, provides insight that demonstrates that OCI is more likely in the early stages of the task-order acquisition.

### **High Risk OCI Type I**

Unequal access to information (UAI) accounted for 54% of protested OCI. An example of UAI is presented in case B-402229.2, the *matter of McCarthy/Hunt, JV*. The GAO found that UAI existed where the protested firm gained non-public information through its acquisition of another firm who possessed the non-public information.<sup>39</sup> In September 2015 PAE Government services paid a \$1.45 million settlement for bid-rigging where it gave “confidential bid information to ensure that their companies would beat out other, honest competitors.”<sup>40</sup> PAE is a current awardee on AFCAP IV. Useful types of information that fall into UAI are knowledge of the government estimate, gaining proprietary data of competing firms, or non-public source selection information. Knowledge of UAI can taint the competitive procurement process and potentially cost the government money. If a firm gains insight into the government cost estimate, it knows what the government is willing to pay.

This is important on a multiple-award IDIQ contract like AFCAP. Since AFCAP seeks to award its master contract to multiple vendors, there is no need for a firm to beat other competitors on price. The firm only needs to appear reasonably priced in order to receive a favorable source selection pricing rating. Once it receives master contract award and that firm later finds itself in a position to receive an emergency sole-source task-order award, the government estimate insight can enable it to defraud the government. This also holds true on task-order modifications because they are negotiated between the contracting officer and the firm and do not involve competitive pricing. A review of AFCAP task-order FA300204R0025 valued

at \$27.9 million in the Federal Procurement Data System – Next Generation (FPDS-NG) reporting system showed 17 modifications against it, and provides an example of opportunity. The constantly changing environment where AFCAP operates as well as limited oversight increases the prospect for firms to gain this type of information through subcontractor arrangements and its performance of contracts awarded by other agencies in the same deployed location. Due to this, UAI is a FWA threat more likely to occur at the onset of an AFCAP task-order competition as opposed to arising at the point of award.

### **High Risk OCI Type II**

Impaired objectivity (IO) accounted for 32% of OCI protests. IO occurs when a firm is or would be in the position of assessing its own performance. GAO decision 411573.2 in the *matter of DRS Technical Services, Inc.* details a sustained IO OCI. DRS alleged that the awardee Lockheed Martin had an IO OCI because the contract required Lockheed to perform test and evaluation of software that it was developing under another Army contract. These situations at least give the perception of impropriety and at worst can lead to fraud.<sup>41</sup> A DoD IG report addressed that \$479 million in contracts for mine resistant vehicles in Afghanistan demonstrated serious OCI violations.<sup>42</sup> Among them were that the contractor was in a position of monitoring its own performance. Findings included oversight of billing for duplicative efforts and direction of Governmental personnel. IO situations create an impermissible risk because often there is no way to track financial loss associated with IO fraud unless it is realized in post-performance audits.

AFCAP operates in an environment where IO can arise undetected. Multiple agencies award many contracts which utilize many of the same contractors. Figure 7 details the prime contract holders on each service's contingency contracts.

**Figure 7. Contracted firms by military component**

Army	Air Force	Navy
Kellog Brown Root (KBR)	KBR	KBR
Fluor	Fluor-Amec II Joint Venture	Fluor
DynCorp International	DynCorp International	Environmental Chemical Corp
	Ch2MHill	CH2MHill
	RMS	URS-IAP (IAP is the parent of RMS)
	URS	URS
	PAE-Perini	Atlantic Contingency Contractors
	Exelis Systems Corp	

**Source:** Author compilation from public sources

Another layer of complexity to these relationships is that much of the work in the deployed environment is accomplished by subcontractors who work for the contractors in Figure 7. The number of subcontractors available in the wartime environment is limited, and they are shared among prime contractors. These relationships demonstrate the inherent complexity of IO identification. There is no mechanism to alert an AFCAP contracting officer when an award may cause conflict with another contract that is already being performed except for firm self-identification. The heavy percentage of protested IO is a signal that firms believe IO exists frequently. This potential frequency is exacerbated by the conditions the AFCAP contract exists in. This information taken together informs the contracting officer that if IO exists, it is likely to exist at task-order onset, but could appear at any point during the life of the task-order which requires constant vigilance.

**OCI Consideration - Expectation vs. Reality**

The reasons given by the GAO for protest sustainment and denial are clear. After removing untimely protests from the equation, 58% of protests were denied because the contracting officer reasonably considered OCI in the protested acquisition. Conversely, 75% of

protests were sustained because the contracting officer failed to give any consideration to the OCI. This is strong confirmation that reasonable consideration of OCI is required.

Examination of the 138 OCI cases revealed that only 12 were task-order level protests. Of them, none occurred on a contingency contract. This indicates that an AFCAP contracting officer is highly unlikely to face a GAO level protest. The incentive for the contracting officer to reasonably consider OCI in this scenario is lacking. Incentives are important because there is an imbalance in the system where there are too few contracting professionals available to adequately manage large contracts.<sup>43</sup> This means an AFCAP contracting officer's time is limited and likely spent in areas facing greater scrutiny. This information viewed through the lens of fiduciary responsibility and public trust is troubling. The higher risk areas and types of OCI identified by the protest data can be better managed on AFCAP with internal process improvements and DoD-wide with stronger reporting mechanisms.

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<sup>37</sup> FAR Council, *FAR Council Plan for Retrospective Analysis of Existing Rules – Status Update*.

<sup>38</sup> GAO, Decision, *Matter of Honeywell Technology Solutions, Inc.* Files B-400771;B-400771.2.

<sup>39</sup> GAO, Decision, *Matter of McCarthy/Hunt JV*, File B-402229.2.

<sup>40</sup> DOJ, *PAE Government Services and RM Asia (HK) Limited to Pay \$1.45 Million to Settle Claims in Alleged Bid-Rigging Scheme*.

<sup>41</sup> GAO, Decision, *Matter of DRS Technical Services, Inc.*, File B-411573.2; B-411573.3.

<sup>42</sup> DODIG, *Contract Management of Joint Logistics Integrator Services in Support of Mine Resistant Ambush Protected Vehicles Needs Improvement*, 4.

<sup>43</sup> Grasso, *Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress*, 23.

## RECOMMENDATIONS

This research concluded that AFCAP is likely to face the two most commonly protested OCI, unequal access to information and impaired objectivity, early in the task-order acquisition phase. The discussion has shown that AFCAP's environment is high risk for OCI due to oversight shortcomings and the high number of firms providing similar services in that environment. The opportunity for successful protests is limited by the GAO stance that the protestor bears the full burden of proof when protesting. AFCAP firms are not incentivized to police each other because the negative effects of a protest would impact all firms on the AFCAP contract. The AFCAP contracting officer is tasked by regulation to identify OCI; however, the main tools for this are contract clauses that required firm self-identification. Finally, there have not been any CAP task-order level GAO protests, which is likely to drive the prioritization the contracting officer gives to OCI identification. The current system relies on the negative effects of an OCI infraction for prevention but identification is so difficult that post performance audit findings are often where OCI infraction is recognized.

### **The AFCAP Customer Role**

In order to recognize the potential for OCI earlier in the process and help control FWA, AFCAP contracting officers can add process controls to aid in identification. Each requirement that becomes a task-order on AFCAP originates in theatre by the customer with the development of a statement of work (SOW) aided by AFCAP program managers. The customer is in the best position to provide early OCI identification information. Creation of a standardized form to accompany the SOW would provide benefits. The form would require identification of any other contracts being performed on behalf of the customer and the name of the firm and its subcontractors providing that service. The initial burden of recording this information would be

minimal and could be easily updated as new contracts were put in place at the customer's location. Each customer is required to provide contracting officer representative capability and this information should be readily available and incorporated into existing duties. When this form is provided to the contracting officer, he or she would have direct insight into which AFCAP firms could have a potential OCI if selected for task-order award.

This same standardized form can be utilized as a chain of custody document for SOW development. An OCI threat in the deployed environment is contractor employee involvement in the SOW development process. This type of undisclosed involvement leads directly to OCI offenses of UAI in the procurement process. This chain of custody document would include the name and affiliation of each individual providing SOW input at the deployed location. Once compiled, the commander would provide signature attesting to the trueness of the document. The preparation time of the document would be minimal and provide a layer of security to the process. Once the contracting officer received this document it could be compared to the firms on AFCAP and known subcontractors to determine if any potential OCI exists for investigation.

### **The AFCAP Contractor Role**

The FAR states that the contracting officer should avoid "creating unnecessary delays, burdensome information requirements, and excessive documentation" when identifying conflicts.<sup>44</sup> The definition of these constraints is subjective and the contracting officer is given great latitude when exercising judgment. The first two recommendations do not rise to the level of hindrance to be avoided. Within the AFCAP program, contractors are required to furnish information required by a Contract Document Requirements List (CDRL). Items in the CDRL include monthly status reports, quality control plans, situation reports, and verification of security clearance.<sup>45</sup>

The AFCAP contract can be modified to include an OCI CDRL. Information that could be requested is similar to what the first two recommendations aim to achieve, transparency. The burden would be no greater than that of items already required by the CDRL. Requesting information through this approach would also satisfy part of the contractor's obligation to self-identify potential OCI. The firm would be required to maintain a list of its active contracts in theatre by location. The level of detail should include the contract, its customer, a brief description of the service, and subcontractors utilized. To minimize burden it could be limited to location. For example, on a contract with performance at Bagram AF, Afghanistan, only contracts under performance at that same location would be included. This would afford the contracting officer the ability to evaluate potential OCI by AFCAP contractors in conjunction with contracts they may be performing under the LOGCAP or Navy contract vehicle. This insight would be valuable given the extent of cross contractor performance identified in Figure 7.

### **The DoD Role**

When an AFCAP task order is awarded, electronic reporting occurs in two systems. The first is the FPDS-NG system which captures federal spending and specific procurement data. The second is the Electronic Data Access (EDA) system. EDA provides for electronic cataloging of contract documents and interfaces with payment systems to streamline contract delivery, preserve resources, and speed payment. Harnessing system resources to track information could be utilized in OCI identification. FPDS-NG data relies on individual contracting officer inputs submitted at contract award. A RAND study estimates that there is a delay of 150 days after contract award before data is available.<sup>46</sup> Due to potential for user error and untimely results, FPDS-NG offers little value for aggregating contract information.

EDA is a more robust reporting tool with mandatory use across DoD. Due to interface with the DoD payment system, EDA includes vendor specific information on all contracts. EDA has gained added functionality and reporting tools since inception. One of these tools is the Management Reporting System (MRS) which allows a host of reports to be run from system stored contract data. One of the functionalities is the ability to support audits. It can generate reports which allow auditors to review contracts and all associated actions against that contract.<sup>47</sup> Development of a report protocol that would allow contracting officers the ability to search contracts by specific parameters in order to identify OCI would be valuable to DoD in the identification of OCI. This type of report could allow a contracting officer to enter a specific contractor's identification data and immediately have access to that contractor's other DoD business dealings. That informational awareness could help prevent OCI from occurring through contracts written by other DoD services.

## **CONCLUSION**

CAP contracts are a necessary instrument for wartime mission accomplishment but they are prone to FWA. The conditions in which they operate, the types of services they procure, and the firms on which they rely generally expose them to OCI infraction. Guidance in the FAR and SAF/IGQ calls to action, compel the contracting officer to identify and mitigate OCI. However, the contracting officer has scarce resources to rely on in order to identify OCI. The primary means of identification depends on the contractor to self-identify potential OCI conflicts. Effective OCI prevention requires management controls that facilitate early identification.

The compilation of 13 years of GAO OCI protest data indicated that overall OCI protests have risen and remain steady at elevated rates. Unequal access to information and impaired



objectivity were the most highly protested types of OCI. The components that define these types of OCI were compared to AFCAP to evaluate conditions in the program that specifically increase susceptibility to this risk. This evaluation concluded that the AFCAP structure is at increased risk for to these type of OCI violations and that it is unlikely to be recognized under current protocol. Three potential process improvements include increased accountability from the customer, demanding transparency from the contractor, and the exploration of flexible reporting through existing systems by the DoD.

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<sup>44</sup> FAR 9.504 (d)

<sup>45</sup> AFICA, *FA8051-14-R-0001*, 22.

<sup>46</sup> Moore, *Findings from Existing Data on The Department of Defense Industrial Base*, 24.

<sup>47</sup> Wide Area Workflow E-Business Suite, *What's New*, 27.



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