

MEDIA MENTION

Wiley Rein's Scott McCaleb Discusses Federal Circuit's Decision in OCI Ruling with BNA

BNA's Federal Contracts Report

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Scott McCaleb, a partner in Wiley Rein's Government Contracts Practice, was interviewed by BNA's *Federal Contracts Report* on October 22 where he discussed the Federal Circuit ruling involving organizational conflicts of interest (OCIs). The Federal Circuit ruled that the Army Corps of Engineers should not have followed the recommendation of the Government Accountability Office (GAO) to re-compete a hospital construction contract because of the presence of OCIs. The court determined that the U.S. Court of Federal Claims (COFC) had properly instructed the Corps to reinstate the contract to Turner Construction. Mr. McCaleb, counsel for Turner Construction, discussed the possible effects of the ruling on future reviews of the GAO's determinations involving OCIs.

Mr. McCaleb stated that he didn't think that the decision would give federal agencies more room to not follow GAO determinations and explained that "the standard is still what it has always been: whether GAO's decision is itself irrational. GAO does an outstanding job deciding a huge volume of protests. Only a handful of its decisions over the past several years have been found to lack reason. That is a very strong track record."

He also discussed whether it was appropriate for the COFC to have evaluated the GAO's OCI analyses, explaining that "the Federal Circuit has indicated in *Axiom*, *PAI*, and now in *Turner* that the assessment of a potential OCI is a fact-specific inquiry that contracting officers are charged with undertaking, and as long as the CO's assessment is reasonable, it should not be disturbed. Thus, where a GAO decision sustains an OCI protest allegation, and the agency follows the GAO recommendation without further comment, it

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is appropriate for the COFC in a subsequent protest challenging the agency's decision to follow that recommendation to review whether GAO's decision itself is irrational. That is a high standard."