

# Personal Conflicts of Interest and Organizational Conflicts of Interest

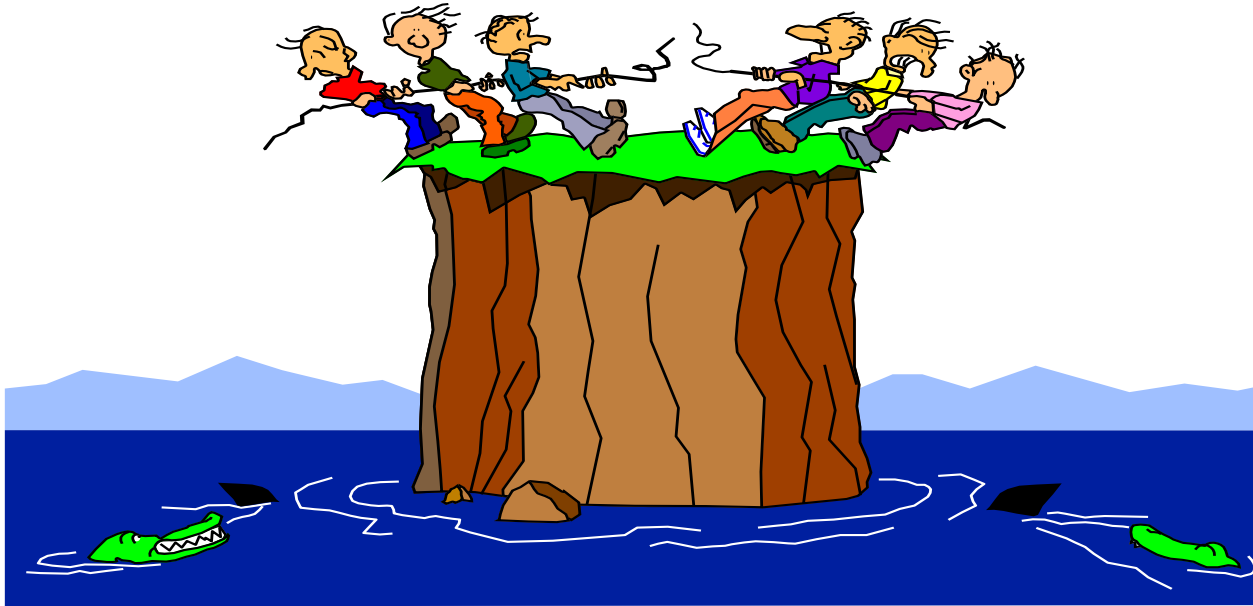
## Fred Geldon

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- Practice provides client counseling relating to all facets of government contracts, especially in compliance and organizational conflicts of interest areas.
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## Personal Conflicts of Interest

# Background

Government employees are admonished to protect the public interest and maintain the public trust.

- Government officials may not participate in matters that might affect their financial interests (or those of family member or related entity). (5 C.F.R. 2635, Subparts D and E)
- Financial interest could include material ownership of stock, service as officer or employee, or pension or severance benefits.
- Government official may not use public office to coerce, for product endorsement, or for private gain of friends.
- Government officials should avoid even appearance of loss of impartiality in performing official duties.
- Government employee who participates personally and substantially in decision or advice regarding matter in which he/she or close family member or related business entity has financial interest may even be criminally liable. (18 U.S.C. 208)

# Personal Conflicts of Interest – FAR Rule

- Service contracting has become a larger and larger part of awarded government contracts. Contractor employees often work side by side with government employees, performing similar functions – but they are subject to different ethics rules.
- Responding to concerns raised by oversight organizations (including GAO), Congress directed the Administrator for Federal Procurement Policy
  - “to develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing relevant acquisition functions (including the development, award, and administration of Federal Government contracts) for or on behalf of a Federal agency or department”; and
  - to develop appropriate contract clause(s).
- Nov. 2, 2011 – Final FAR Rule issued to address Personal Conflicts of Interest

# FAR Clause

## 3.1106(a) -- Contract clause.

Insert the clause at FAR 52.203-16, Preventing Personal Conflicts of Interest, in solicitations and contracts that

- (1) Exceed the simplified acquisition threshold; and
  - (2) Include a requirement for services by contractor employee(s) that involve performance of *acquisition functions* closely associated with *inherently governmental functions* for, or on behalf of, a Federal agency or department.
- Substance of clause must be flowed down in subcontracts that fit the coverage criteria.

# Inherently Governmental Functions

“Inherently governmental functions” relating to acquisition include (per FAR 7.503(c)):

- planning acquisitions
- developing statements of work and other requirements documents or evaluation criteria
- evaluating proposals
- awarding contracts
- administering contracts
- terminating contracts
- evaluating whether costs are reasonable, allocable, and allowable

FAR 7.503(d) lists non-inherently governmental functions (including evaluation of performance or proposals)

# Personal Conflicts of Interest – FAR Clause

- Contractor employees must not have personal conflicts of interest – i.e., financial interests, personal activities or relationships that could impair the employee’s ability to act impartially and in the best interests of the Government when performing under the contract. Includes
  - Financial interests of employee, close family members, or members of household
  - Other employment or financial relationships (salaries, consulting relationships, research funding, investment, intellectual property ownership)
- Contractor employees must not use their functions, or nonpublic Government information to which they have access, for personal gain (or for benefit of “close family members”).
  - Nonpublic information means information that is exempt from disclosure under the Freedom of Information Act, has not been disseminated to the public, and has not been determined to be made public. In other words, the default position is “nonpublic.”



# Personal Conflicts of Interest – FAR Clause

## Procedural requirements

- Contractors must:
  - Screen for potential PCI's (including financial disclosures by employees), and updated financial disclosures when appropriate
  - Not assign employees who have personal conflicts of interest, unless conflict can be satisfactorily mitigated or waived by head of contracting activity
  - Inform employees of obligations
  - Obtain executed nondisclosure agreements
  - Maintain oversight to verify compliance
  - Report violations to contracting officer
  - Take appropriate disciplinary action when appropriate
  - Maintain processes for screening, tracking, training, discipline



# Organizational Conflicts of Interest

## FUNDAMENTALS

# Organizational Conflicts of Interest (OCI)

- An OCI “means that because of other activities or relationships with another person,
  - a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired,
  - or a person has an unfair competitive advantage.”
- An OCI may exist with respect to existing procurement, or with respect to a future acquisition.

# Unequal Access to Information

- Arises when contractor, as part of its performance, has access to nonpublic information that will give it an unfair competitive advantage over other offerors.
- As a general rule, simply being the incumbent (and thereby having better understanding of customer or requirements) does not create an OCI. “Experience” is considered a “natural advantage of incumbency.”
- An OCI may arise, however, when an incumbent contractor has proprietary information, source selection information, or other nonpublic information not available to competitors that gives contractor ***unique insight*** into bidding or evaluation process (e.g., knowledge of future requirements, budget estimates)

# Unequal Access OCI - Mitigation

- **Firewall** between “those in the know” and proposal team will eliminate competitive advantage.
  - May include confidentiality/nondisclosure agreements, document control, geographic/ physical/ organizational, electronic separation, education, and job mobility restrictions.
  - More is not necessarily better.
  - Must be approved by CO in advance, tracked and documented. (**First Rule of Government Contracts**: It’s not enough to satisfy the requirement. You must be able to demonstrate that you did so.)
- **Alternative method - Disclosure**: government can disclose non-public competitively-helpful information to all offerors.
  - Neutralizes advantage if all offerors have timely information.
  - Agency must be willing to make information “public.”

# Impaired Objectivity

- Arises when contract gives contractor ability to benefit its other business interests.
- Example – if contractor, under one *government contract*, is required to evaluate work:
  - it performed under another separate contract
  - performed by an affiliated company
  - performed by a competitor
- Primary concern is that contractor will not act objectively because of other economic incentives and consequences.
- Test: would reasonable person find that contractor's objectivity could have been impaired. If so, OCI is presumed.

# Impaired Objectivity - Mitigation

Mitigation requires careful assignment of work:

- Removing conflicted work from scope of contract, or from conflicted subcontractor.
- Assigning work to firewalled subcontractor
  - increases government oversight burdens.
  - Prime may lose control of performance of contract.
  - Is subcontractor really independent?
- Standardizing task (“read the meter”) to eliminate need for contractor to exercise judgment.
- Requiring divestiture of affiliated entity.
- Worst case: “A bird in the hand or two or two birds in the bush?”



# Biased Ground Rules

- Arises when contractor has the ability to **set the ground rules** for another procurement.
- Government's primary concern is that contractor's input
  - may not be objective, in the best interest of the government
  - may give the contractor an unfair competitive advantage by virtue of its special knowledge of (and input into) the terms of the solicitation.
- Example: contractor writes the specifications or SOW or provide Systems Engineering Technical Assistance (SETA) and seeks to bid on the production contract.



# Biased Ground Rules - Avoidance

- Can't mitigate after-the-fact, since harm has already been done.
- Can avoid for future procurement:
  - Agency can seek input from many potential bidders, as in Request For Information (RFI).
  - Agency can use contractor as industry representative.
  - Agency can narrow tasking or allow contractor to decline task (as long as agency has alternative way to meet its needs).

# Marketing Activity Is OKAY!

- Trying to “shape the deal” before the RFP is issued does not create an OCI, as long as
  - that activity is not paid for as part of an existing contract; and
  - other potential bidders have an equivalent opportunity to provide similar input.

# FAR Subpart 9.5 – Contracting Officer's Responsibility

The Contracting Officer is directed to

- analyze acquisitions to identify potential OCIs early in process.
- avoid, neutralize or mitigate significant potential conflicts before contract award.
- before withholding award, notify contractor and allow opportunity to respond. (Due Process)
- seek waiver if it is in the best interests of the United States.
- include in solicitation a statement of any restraint on eligibility for future contracts or subcontracts.

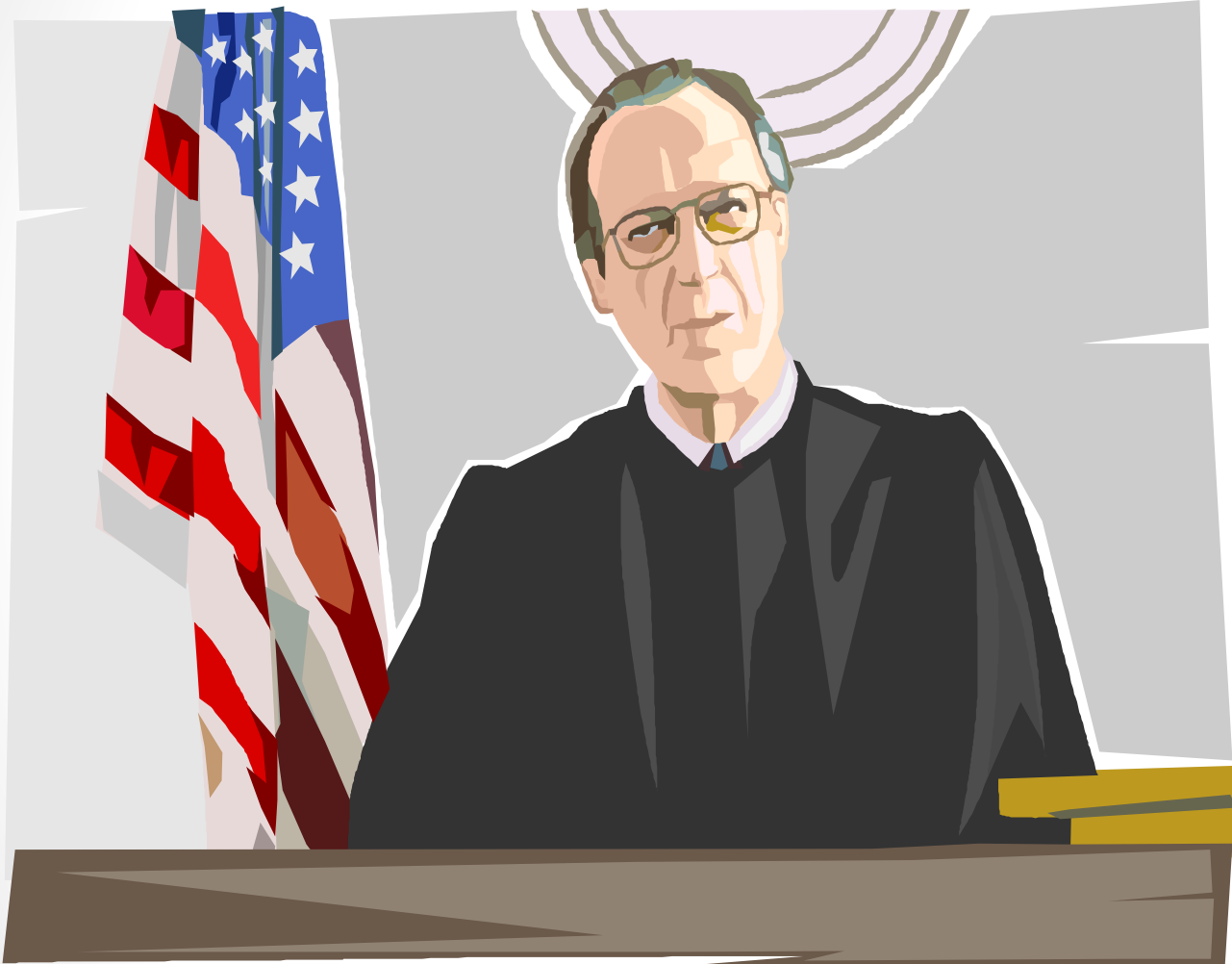
# Best Practices – CO Responsibilities

- In RFP, identify potential future restraints on eligibility.
  - Contractors can make intelligent bid decisions.
  - Reduces protests if contractors know the ground rules.
- Consider appropriate use of waiver authority where OCI will not affect integrity of competitive process.
- Contracting Officer should address and determine significant potential conflicts early in process.
  - Gives most flexibility to resolve OCIs.
  - Allows potential offerors to make sensible bid/no-bid decisions, avoid unnecessary bid and proposal costs.
  - Protests less likely.
  - Downside: May require CO to evaluate multiple contractors.

## FAR – Contracting Officer’s Responsibility

“Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.”

FAR 9.505



# OCI Protest Decisions

# Procedural

- Many protests granted based on contracting officer's failure to adequately review potential OCIs.
- **Independent Review:** Contracting officer must do own analysis; should not rely on offeror's statement that there is no OCI.
  - E.g., The Analysis Group cases
- **Due Process:** Contracting officer must reasonably consider potentially-excludable offeror's OCI mitigation plan.
  - E.g., AT&T case

# Best Practices – Sources of Information

- Information from Offeror - Quality is more important than quantity. More is not necessarily better.
- Focus on important and relevant information.
- Avoid overburdening both offerors and agency.
- Sources (suggested in proposed FAR Rule) include:
  - Government (contract office files, requiring activity, audit and financial offices)
  - Public (offeror websites, trade publications, journals, Dun and Bradstreet, Lexis/Nexis, Google, corporate shareholder reports, other SEC filings).



# Unequal Access to Information

- Use on proposal of former government employee may create an unequal access to information OCI.
  - E.g., HealthNet case
- Unfair competitive advantage is presumed if there is access; there is no need to show that information was actually used.
- If former government employee had access to non-public propriety information, prima facie case established; CO must consider whether awardee had unfair competitive advantage.
- **Best Practice:** Contractor should screen for issue in hiring process, provide guidance to employee, and disclose to CO where appropriate.
- **Best Practice:** Where possible, CO should follow up when official leaves agency.

# Impaired Objectivity

- If a contractor's exercise of judgment on one contract might affect its past performance evaluations on another contract, there is an impaired objectivity OCI.
- A firewall will not mitigate an impaired objectivity OCI because the OCI pertains to the organization, not to the individual employees.
- Mitigation based on government oversight must be specifically-described and credible; agency must have expertise and resources.
  - E.g., Nortel case

# Biased Ground Rules

- Use of contractor's SOW and cost estimate in procurement will create OCI, even though material was prepared for different purpose. "Feasibility study" may become SOW.
- Test is whether the information supplied led "directly, predictably, and without delay" to statement of work.

Test is not whether company actually drafted specifications that benefited itself, but whether company was in position to do so.

**Warning flag:** Request made near end of contract for job descriptions, staffing levels, work plans.

**Warning flag:** SOW appears to be copied from your submissions – hip, hip, hooray, but what should you do?

# Best Practices – Consider

- Offeror's contracts with agency, especially:
  - procurement or contract management support, SETA work
  - similar subject matter
- Offeror's ownership and business affiliations
- Offeror's access to non-public agency information
- Discussions/understandings with other CO's
- Does SOW provide opportunity for contractor to exercise judgment or provide advice?
  - Description of task ("advise," "recommend")
  - Key personnel clauses
- Who has had input into specifications or SOW?

# Mitigation

- Many protests have been decided on basis of whether potential OCI risks can be adequately mitigated.
- Purpose of mitigation plan is to reduce, and if possible eliminate, impact of real or potential OCI.
- Choice of mitigation strategy is highly fact-dependent and varies with contract details, type of OCI, contractor's goals and resources, and agency's general approaches.
- One size most definitely DOES NOT FIT ALL.
- Some OCI's cannot be mitigated (e.g., Aetna case)

**GOAL: A Plan that contractor can live with and Contracting Officer will approve!**

# Best Practices - Mitigation

- After the fact, ad hoc mitigation plans rarely succeed. But GAO will give substantial deference to mitigation plan if agency has investigated and dealt with conflict issues and plan is tailored to specific situation. Communicate with agency/offerors about possible OCIs and mitigation as early as possible.
- If there is potential OCI (or potential questions about OCI), it is prudent to submit OCI analysis and, if appropriate, mitigation plan.
- Remember First Rule of Government Contracts – make sure you can prove that you followed the plan.
  - Your performance must be auditable.
  - What compliance records will be available to agency?

# Best Practices – Mitigation Plans

- Provide necessary background: relevant part of offeror’s business and affiliations, related contracts with same agency or involving same products or services.
- Discuss any possible OCI issue or explanation of why contract does not raise any OCI issues.
- If there are potential OCI’s, describe mitigation actions that will be taken, and explain why they will successfully mitigate or avoid OCI. Be substantive and provide details.
- Provide robust description of how plan will be administered and implemented – i.e., education and training, certifications, assignment of responsibilities.
- Don’t make mitigation plan so cumbersome that it cannot be successfully implemented and monitored.
- Don’t just repeat “ipse dixit” mantra that “This Plan will avoid, neutralize or mitigate potential OCIs.”

# Coming attractions – History (Proposed FAR OCI Rule)

- Proposed rule issued April 26, 2011. Never finalized.
- Significant potential changes:
  - Structural: OCI (Impaired Objectivity and Biased Ground Rules) moved to Part 3, Unequal Access moved to Part 4.
  - Contracting Officer discretion to accept OCI if only Government's interests affected (Impaired Objectivity).
  - Structural barriers can address OCI caused by affiliate.
  - If only risk is to Government's interests, may include OCI as evaluation factor.
  - Includes model clauses. (DFARS, some agencies have)
  - Changes process for contractor access to third-party proprietary information (moved to new FAR case).



# Proposed Rule - Best Practices

- Incorporate mitigation plans into contract.
  - Already required by DFARS Rule, some agencies
- Program office should identify contactors that participated in preparing SOW or requirements or cost estimates, and identify contractors prohibited from competing due to pre-existing limitations. (Note: Program/requiring technical organization should be involved throughout process, because they may be able to redefine requirements to avoid conflicts and to ensure that resolution will allow them to meet mission requirements.)
- For task order contracts, consider OCI's both at time of contract award and at times of task order awards.

# Coming Attractions - Preventing Organizational Conflicts of Interest in Federal Acquisition Act

Signed on December 27, 2022

Act was prompted by concerns that consulting companies “play both sides” when they advise government agencies and, through different divisions, advise companies regulated by those agencies. (E.g., consulting company advised FDA on opioid safety issues while working for opioid manufacturers.)



- Directs FAR Council to provide clear definitions, guidance, and standardized clauses
- Expands focus on contract awards for consulting services to contractors whose employees “are permitted by the contractor to simultaneously perform work under a contract for a private sector client under the regulatory purview of such agency.”



**Stay tuned!**

# Contractor Best Practices - General

- Don't hide your head in the sand. If there is an OCI issue, it will surface during the procurement. Err on side of full disclosure - troubling issues should be highlighted and dealt with, not hidden. Submit a proposed OCI mitigation plan when there may be an actual or potential OCI.
- Internal business teams must communicate effectively since one team can unknowingly create OCI that impacts another.
- Be particularly careful when a procurement opportunity will take company into new areas of business.
- Assess OCI potential early during M&A due diligence.  
(Turner case)

# Contractor Best Practices – Mitigation

- Develop company-wide process (to support contract-specific plans).
  - Provides an opportunity to highlight layers of OCI review conducted prior to bid decision.
  - Consider establishing “OCI Officer” or “OCI Team.”
  - Develop standardized firewall process and procedures.
- Develop databases or other tracking mechanisms to facilitate monitoring:
  - Contracts, task orders, and potential contracts.
  - Employees affected by firewall or other restriction assignments.
  - OCI plans and obligations.
- Consider OCI’s when negotiating teaming and joint venture arrangements and include affected team members in development of plan.

# Contractor Best Practices - General

- Front line OCI defense lies in employees who have access to information, are asked for input into specifications, or exercise judgment on behalf of government. They must learn how to avoid situations where OCI issues can arise.
- Questions they should ask themselves:
  - “Have I obtained non-public information that gives my company an unfair competitive advantage?”
  - “Am I being asked to provide information or advice, or take an action, that might help my company (or hurt a competitor)?
  - “Am I being asked for input or information that might find its way into a future government procurement?”



# Government Best Practices - General

- Consider treating OCI as selection criteria (not just eligibility/responsibility).
- Evaluating mitigation plan (allowing government to give more credit to contractor with lower OCI risk or more robust plan) may be appropriate
  - In task order contract where OCI issues are likely to arise during performance.
  - In order to consider differential burdens on agency.
  - If future scope of work is contingent and OCI remedy would be burdensome (e.g., divestiture) and might not be necessary.

# Government Best Practices - General

- Disclose OCI determinations in solicitation:
- Include company-specific determinations of companies that are excluded and of companies that will be permitted to compete, despite other business with agency.
- Avoids “gotchas” and facilitates industry “buy-in.”
- Allows time to consider challenges and issues.
- Post-award protests are untimely; pre-award protests are less likely and less disruptive.

# Government Best Practices - General

- Avoid being categorical. Treat each situation based on its particular scope of work, rather than broad categories. This may take more effort and analysis, but it will lead to substantially improved competition and fairness.
- Example from FAR 9.508:
  - Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines. Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant.



# Government Best Practices - General

- Front line OCI defense lies in contractor-facing employees, who provide access to information, request input into specifications, or rely on contractor's advice. They must be trained to recognize situations where OCI issues can arise.
- Employees should not:
  - Reflexively send emails, documents, or other review information to ill-defined distribution lists.
  - Allow contractors to participate unnecessarily in meetings where sensitive procurement-related information is shared.
  - Ask contractors for advice beyond requirements of contract.
  - Use contractor-supplied information in solicitation.



# Government Best Practices - Balancing

- When considering whether mitigation is sufficient (or OCI should be waived):
  - Balance potential for biased judgment versus effect of exclusion on future competition.
  - Balance need for impartiality with need to attract experts with experience.
- DFARS Rule - agencies should obtain advice from sources that are objective and unbiased, but should preserve access to expertise and experience of qualified contractors.



# Knowledge Check Question #1

- The FAR Personal Conflict of Interest (“PCI”) Rule applies to contractor employees:
  - A. who are working at a government site.
  - B. who are providing “personal services” under a government contract.
  - C. who are performing acquisition functions closely associated with inherently governmental functions.
  - D. who are providing “staff augmentation” services.



# Knowledge Check Question #1 - Answer

Correct Answer: (c) The FAR Personal Conflict of Interest Rule applies to contractor employees who are performing acquisition functions closely associated with inherently governmental functions. Examples of procurement activities considered to be “inherently governmental functions” - e.g., awarding contracts, ordering contract changes, or determining cost reasonableness - can be found in FAR 7.503(c)(12).

The PCI Rule applies regardless of the location or ownership of the worksite. “Staff augmentation” services and “personal” services contracts (which are discouraged) may, or may not, be subject to the Rule, depending on whether the statement of work fits within its coverage.



# Knowledge Check Question #2

- Biased Ground Rules Organizational Conflicts of Interest (OCI's) raise problems because:
  - A. They may give one offeror an unfair competitive advantage.
  - B. They may prevent the government from receiving objective advice.
  - C. Neither (a) nor (b).
  - D. Both (a) and (b).



# Knowledge Check Question #2 - Answer

- Correct Answer: (d) Both. If an offeror has input into the solicitation, it may create a “biased ground rules” conflict of interest. The concern is that the contractor’s may, intentionally or not intentionally, influence the solicitation in its own favor. This influence may be motivated by what is in the best interest of the contractor and may not be in the best interests of the government. And it may give the contractor an unfair competitive advantage by virtue of its special knowledge of, and input into, the terms of the solicitation.



# Knowledge Check Question #3

- A firewall, by itself, can successfully mitigate:
  - A. an unequal access to information OCI.
  - B. an impaired objectivity OCI.
  - C. a biased ground rules OCI.
  - D. any OCI.



# Knowledge Check Question #3 - Answer

- Correct answer: (a) A firewall can mitigate an unequal access to information OCI. If those who have access to competitively-useful information are not able to share it with the people who could potentially use it in a competitive procurement – i.e., the proposal team – then the offeror will not have a competitive advantage.

A firewall, by itself, cannot mitigate an impaired objectivity OCI or a biased ground rules OCI because the OCI pertains to the organization, not to the individual employees. Contractor employees who provide advice or solicitation input to the government know whose team they are on and may be motivated by what is in their company's best interest, even if no competitively-sensitive information is shared.





# Knowledge Check Question #4

- An offeror should provide an OCI Mitigation Plan to the government:
  - A. only when the government requires it.
  - B. only when a court orders the contractor to provide it.
  - C. whenever the offeror believes it might have an actual OCI or potential OCI, or the appearance of one.
  - D. in every procurement.



# Knowledge Check Question #4 - Answer

- (c) Of course, an offeror should certainly provide an OCI mitigation plan to the government when it is required. But it should also provide a plan to the government, without being asked, when the offeror might have an actual OCI or potential OCI, or the appearance of one, and wants to persuade the government that the OCI can be avoided, neutralized, or mitigated. An offeror may also want the government to review its OCI plan to find out whether it will ultimately be considered eligible to receive an award, lest it waste bid and proposal costs in a futile pursuit.



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