

# PCI's Executive Exchange: Organizational Conflicts of Interest

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March 1, 2023

# Introduction

- As we learned in our last session, the integrity of the procurement process is one of the primary goals of the U.S. Government
- Dealing with actual or perceived conflicts of interest is an important feature of the procurement process
- In addition to typical conflicts of interest, in Government contracting there is a phenomenon known as an “organizational conflict of interest” or OCI
- OCIs often underly GAO protests
- Prime contractors may ask for a potential sub’s certification relating to absence of an OCI

# The Guidance

- In theory, OCIs are addressed in FAR Subpart 9.5, but in fact this part of the FAR is very outdated and has been under revision since 2011
- For our purposes, we will look to the GAO's rulings on protests involving OCIs as well as as NASA's Guide on Organizational Conflicts of Interest



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# Players

- Under the FAR, C.O.s are supposed to take the lead in dealing with OCIs
- Unfortunately, the C.O. is often the last person to realize that an OCI is a potential issue, and therefore contractors have to be proactive in identifying and addressing OCIs or potential OCIs at the earliest possible point in time
- If a C.O. should decide that a particular acquisition might involve a significant potential OCI, the C.O. shall prepare an analysis of the situation as well as appropriate solicitation and contract clauses to deal with it—there are no standard provisions

# Definition

- According to FAR 2.101, an OCI means that because of other activities or relationships with another person, a person is unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage
- An OCI may exist with regard to an existing procurement or a future procurement
- Incumbency does not automatically create an OCI—an incumbent's experience and understanding are considered to be a “natural advantage of incumbency”

# Where Do We See OCIs?

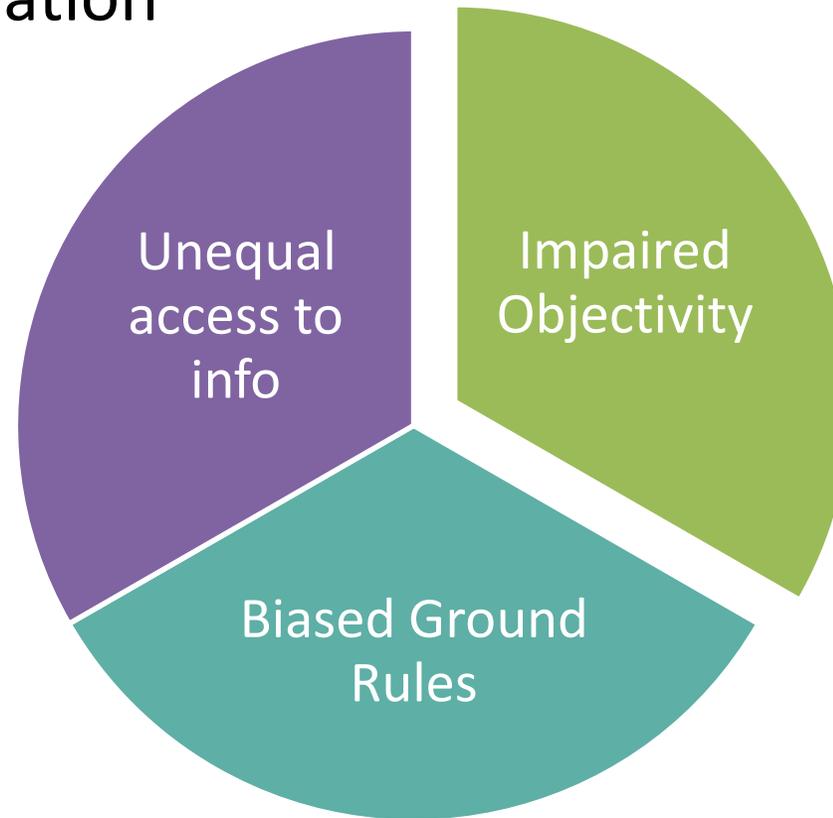
- Primarily a problem in management and support services contracts, support and technical evaluation contracts, and systems engineering and technical direction contracts
- The C.O. possesses waiver authority where the OCI will not affect the integrity of the procurement process
- GAO rarely questions such waivers



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# Three Basic Kinds of OCI

1. Unequal Access to Information
2. Impaired Objectivity
3. Biased Ground Rules



# Unequal Access to Information

- An unequal access to information OCI is created when a contractor has access to nonpublic information that may provide it with an unfair competitive advantage in a future competition
- Examples would include (a) Contractor A having access to Contractor B's proprietary data for purposes of performing Contractor A's contract or (b) Contractor A, in the course of performing a contract for an agency, has access to the agency's source selection plan for an upcoming procurement
- Service contractors supporting an agency's procurement activities often have access to both kinds of information

# Tests for An Unfair Competitive Advantage

1. Whether the information in question was unavailable to potential offerors;
2. Whether the nonpublic information would have been useful in responding to a solicitation; and
3. Whether the contractor would be afforded an unfair competitive advantage by having access to the public information



# Mitigation

- Might build a “firewall” between those personnel “in the know” and the proposal team
- Might use NDAs, document control, physical barriers, electronic separation, *etc.*
- Must be approved by C.O. in advance and must be tracked

OR

- The agency can opt to disclose the non-public competitively-helpful information to all offerors

# Impaired Objectivity

- Created when a contractor's judgment and objectivity in performing a contract requirement may be impaired due to the fact that the substance of the contractor's performance has the potential to affect other interests of the contractor
- Classic example might occur when a contractor is performing evaluation services for an agency, but has become more widespread due to the broad assortment of services performed under Government contracts
- Industry consolidation has also had an impact

# Impaired Objectivity, cont.

- There are two elements to this conflict:
  1. The use of subjective judgment by the contractor; and
  2. Whether the contractor has a financial interest in the outcome of its performance

Example: Company A purchases Company B and discovers that one of Company B's contracts calls for Company B to evaluate Company A's performance under a Government contract

Example: Company A has an evaluation contract under which it is called upon to evaluate a key competitor's performance

# Mitigation

- Mitigation requires the careful assignment of work
- Might include removing the conflicted work from the SOW, or from a conflicted sub
- Might be able to standardize the task so that no judgment needs to be exercised—just check the boxes
- Might require the divestiture of an affiliate



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# Biased Ground Rules

- Created when a firm, as part of its performance of a Government contract, has in some sense set the ground rules for another Government contract by, for example, writing the Statement of Work or the specifications
- Primary concern is that the firm could skew the future competition, *whether or not intentionally*, in favor of itself (for example, drafting language that would require the use of its products)
- Unfair competitive advantage is also a concern here because a firm's special knowledge of an agency's requirements would give it an unfair advantage in future competitions for such requirements

# Biased Ground Rules, cont.

- Can't mitigate after-the-fact because the harm has already been done
- The standard means of addressing such situations is to bar the contractor from participating either as a prime or a sub for a reasonable period of time
- In other words, the OCI can be avoided for future procurements



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# Resolving OCIs

- NASA has several suggestions for resolving OCIs:
  - Ensure the SOW does not require contractors to use subjective judgment
  - Ensure that the work involving subjective judgment is performed by the Government or by a contractor that has no conflicts
  - Ensure that more than one contractor prepares a specification or SOW for a competitive solicitation
  - Eliminate a contractor or group of contractors if the agency has “hard facts” showing an OCI exists

# GAO Decisions

- Many protests have been sustained on the grounds that the C.O. failed to adequately review potential OCIs
- Before excluding an offeror, for example, the C.O. must reasonably review the offeror's mitigation plan
- The C.O.'s review must be meaningful



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# Mitigation Plans

- A Good Mitigation Plan should include:
  - Background Information—a description of the offeror’s business and affiliates, related contracts with the same agency or involving the same products or services
  - The Problem: a description of the possible OCI or an explanation why there is no OCI
  - Mitigation Actions that will be undertaken and why they will work to avoid an OCI
  - Administration—a description of how the plan will be tracked and enforced
  - CAUTION: Don’t make the plan so complicated that it will be bound to fail

# Questions?

# Tim Sullivan

Tim Sullivan has spent 45 years in the Government contracting world. He is a co-founder of the Public Contracting Institute and has lectured and written on Government contracting topics, both nationally and internationally, since 1983. He has dealt with the full range of Government contracting issues and has successfully litigated both bid protests at the GAO and the U.S. Court of Federal Claims and contract claims before the boards of contract appeals and the U.S. Court of Federal Claims.

Tim spent his last 19 years of practice as a partner at Thompson Coburn LLP, where he chaired the Government Contracts Group. Tim is widely acclaimed for his lectures on contract negotiations.

Tim earned a bachelor of arts degree from the University of Michigan and his Juris Doctor degree from Georgetown University Law Center, where he was a member of the Georgetown Law Journal. Tim also served as a counterintelligence agent for the U.S. Army and as a contract negotiator for the Central Intelligence Agency.



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