



# Organizational Conflicts of Interest Workshop

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

Prior experience includes 21 years at Electronic Data Systems Corporation, including Director of Contracts and Legal for EDS Federal.



# Let's Get Acquainted

My principal role is:

- a) Contracts
- b) Operations
- c) Management
- d) Finance and Accounting
- e) Other

# Let's Get Acquainted

Organizational Conflicts of Interest and I are:

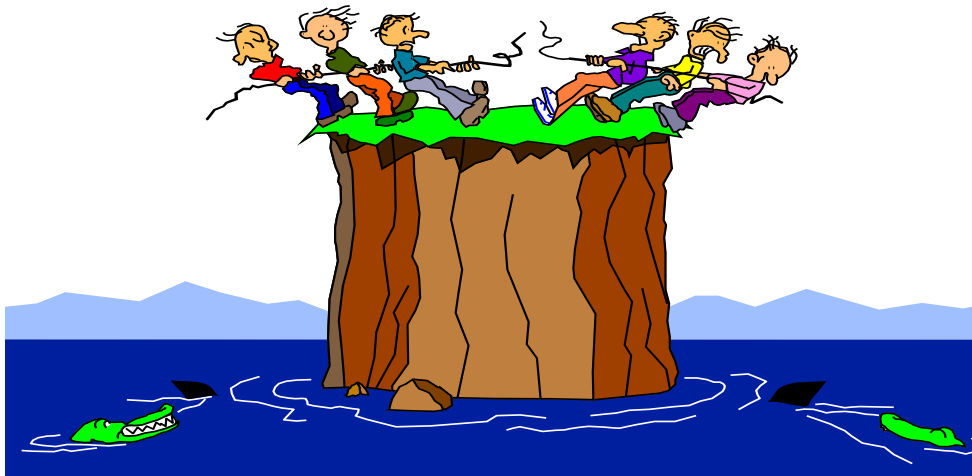
- a) Old friends
- b) Frenemies
- c) On our first date
- d) What's an OCI?

# Purpose of Webinar

- Learn about the three types of OCI's
- Understand regulatory requirements
- Understand “common law” GAO and COFC protest decisions
- Learn about proposed FAR OCI rule
- Understand to identify existing OCIs and potential future OCIs
- Understand how to mitigate existing and potential future OCIs
- Understand how to address Personal Conflicts of Interest

# Organizational Conflicts of Interest

## THE THEORY



# Organizational Conflicts of Interest (OCI)

## FAR 2.101

- 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.”

# Organizational Conflicts of Interest

In essence, an OCI occurs when

- work performed on one contract creates an unfair advantage in competing for another, or
- contractor cannot perform impartially because of its other interests.

An OCI may exist with respect to existing procurement, or with respect to a future acquisition.



## Why Do OCIs Matter?

- OCI may prevent contract award.
- OCI may cause termination of an awarded contract.
- Contractors want to avoid wasting bid and proposal resources.
- Contractors want to implement sound business strategies involving potential mergers and acquisitions.
- Violations (of certifications) can lead to civil and criminal sanctions.

## Three Kinds of OCIs

- **Unequal access to information**
  - Unfair competitive advantage
- **Impaired objectivity**
  - Cannot perform impartially
- **Ability to set biased ground rules**
  - Both

# Unequal Access to Information

- Contractor has access to nonpublic information that will give it an unfair competitive advantage.
- “Natural advantage of incumbency” is not OCI.
- OCI if incumbent contractor has proprietary information, source selection information, or other nonpublic information about new procurement (e.g., knowledge of future requirements, budget estimates, etc.)
- Access > presumed unfair competitive advantage
- Mitigation: firewalls or full government disclosure.



# Impaired Objectivity

- Contractor can provide advice that may benefit its other business interests.
- Examples:
  - Contractor is evaluating its performance under different contract
  - Contractor is advising about regulations that could affect affiliate
- Concern: will Government get objective advice?
- Opportunity > presumed that contractor will use it
- Mitigation: revisions or limitations to work assignments

# Biased Ground Rules

- Contractor has input into ground rules for another procurement (e.g., writing statement of work or specifications)
- Contractor could
  - skew competition in its own favor;
  - skew competition against government's interests; and
  - learn about agency's future requirements and specifications
- Opportunity > presumed that contractor will use it
- Frequent scenario: contractor writes specifications or SOW or provides Systems Engineering Technical Assistance (SETA)
- No OCI if input is open to all (e.g., RFI's)
- Mitigation: Sorry, too late!
- **Note: Trying to “shape the deal” before the RFP is issued does not create OCI, as long as it the activity not part of an existing contract and other potential bidders can do the same.**

# Why Are OCIs Arising More Frequently?

- Consolidation in the defense industry
- Proliferation of “umbrella” contracts
- Broad statements of work
- Attrition of government’s acquisition workforce and outsourcing of procurement support functions
- More procurement of services that involve the exercise of judgment

# Organizational Conflicts of Interest

## THE REGULATIONS



# Federal Acquisition Regulation

OCI regulations are set forth in FAR 9.5.

- “Prescribes responsibilities, general rules, and procedures for identifying, evaluating and resolving organizational conflicts of interest;” and
- “Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations.”
- Drafted in 1960’s – few changes since then.



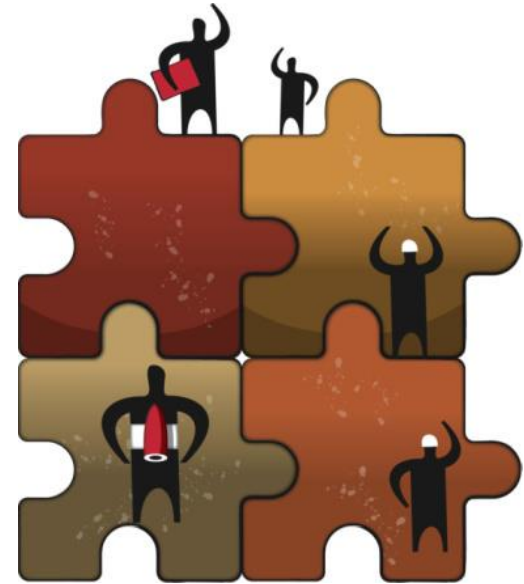
## FAR – Where Do OCIs Occur?

- Management support services contracts
- Consultant and professional services contracts
- Support and technical evaluation contracts
- Systems engineering and technical direction contracts (unless the contractor already has overall program responsibility)
- Multi-customer task order contracts
- Government-Wide Acquisition Contracts (GWAC's)
- Acquisitions of companies with related contracts

# FAR – What Is Systems Engineering and Technical Direction?

All or substantially all of:

- Determining specifications
- Identifying and resolving interface problems
- Developing test requirements
- Evaluating test data
- Supervising design
- Developing work statements
- Determining parameters
- Directing other contractors' operations
- Resolving technical controversies



# FAR – 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”
- obtain advice of legal counsel, other specialists

**“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**

## FAR – Contracting Officer’s Responsibility

- Recommend to head of contracting activity course of action for resolving OCI.
- Before withholding award, notify contractor to allow opportunity to respond.
- Seek waiver of OCI 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.

## FAR – Situations That Create OCIs - BGR

- Contractor provides SETA services (but not overall responsibility for development or production)
  - Contractor should not receive contract to supply system or major component.
- Contractor prepares work statement or specifications for competitive acquisition, “or provides material leading directly, predictably, and without delay to such a work statement.”
  - Contractor should not furnish system or services for “a reasonable period of time” (at least initial production contract), unless:
    - Contractor furnishes specifications for own product
    - Contractor acts as industry representative
    - Development contractor (unavoidable advantage, but not unfair)

## FAR – Situations That Create OCIs - IO

- Contractor should not be awarded a contract to evaluate:
  - its own offers for products or services
  - those of a competitor



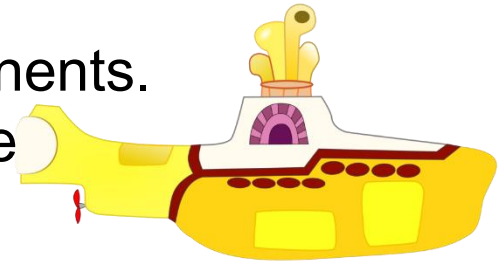
# FAR – Situations That Create OCIs

- If contractor requires third-party proprietary information, it must agree
  - to protect information from unauthorized use or disclosure
  - not to use information for any other purpose
- Purpose
  - avoid giving contractor unfair competitive advantage
  - encourage third-parties to provide necessary information
- Contracting officer obtains copies of confidentiality agreements

# OCI Examples (1 of 2)

## Examples from FAR 9.508 – “not all inclusive”

- Company A provides SETA services on powerplant for submarines.
- Company A can't supply powerplant components.
- Company A can supply unrelated submarine components.



- Company A is SETA contractor for system X. System X is canceled. Later, system Y is developed for same purpose in different fashion.
- Company A may supply system Y or its components.
- Company A develops new electronic equipment and prepares specifications.
- Company A may supply the equipment.



## OCI Examples (2 of 2)

- Company A prepares data system specifications and equipment performance criteria to be used as basis for competition.

→ Company A may not receive initial follow-on hardware acquisition.

- Company A prepares detailed curriculum for scientific and technical training, which is incorporated into RFP.

→ Company A may not be awarded a contract to conduct the training.



- Contractor X develops system for evaluating and processing license applications.

→ Contractor X should be prohibited from acting as consultant to applicants during contract period and for a reasonable period thereafter.

## FAR – Contractor’s Responsibility

FAR Subpart 9.5 is directed principally at government. However, contractors should:

- Identify actual and potential OCIs proactively (because somebody will!)
- Actively communicate with CO to agree upon how to avoid or mitigate potential OCIs.

# Defense FAR Supplement Rule

- Implemented Section 207 of the WSARA of 2009
- Major Defense Acquisition Programs –
  - Systems architecture and SETA – only from FFRDC's or other independent sources
  - They are prohibited from participating as contractor or Major Subcontractor (10% or \$55M)
- Response – major contractors divested systems engineering divisions
  - Northrop Grumman → TASC
  - Lockheed Martin → Enterprise Integration Group
  - ITT → CAS
  - L-3 → new company (“Engility.”)
  - SAIC → Leidos

# Organizational Conflicts of Interest

## THE CASES



# Where Are OCI Decisions Made?

- By agencies, in procurements.
- Bid Protest Claims
  - Awardee had unfair competitive advantage
  - Agency did not adequately address OCI. (92%)
  - Pre-award challenge to OCI exclusion. (8%)
- Forums
  - Government Accountability Office (GAO)
  - Court of Federal Claims (CFC)
  - Agencies (not publicly available)
- Published decisions provide “common law.”

## OCI Decisions – Procedural

- Many protests challenge CO's failure to adequately review potential OCIs.
- Contracting officer must do own analysis
- GAO will not “second guess” agency but will review reasonableness of agency's actions.
- Size (of OCI review) may matter.
- Exchanges regarding OCI mitigation plan are not discussions.

## OCI Decisions - Procedural

- Decision is arbitrary and capricious if
  - agency failed to consider important aspect
  - agency offered implausible explanation
- “Hard facts test”
  - For CO to exclude offeror for apparent OCI
  - For GAO to overturn CO decision
- CO must consider OCI mitigation plans
- OCI waivers are generally sustained

# OCI Decisions - Procedural

## Scenario A1

### The Contracting Officer's Responsibility



# A1 - The Contracting Officer's Responsibility

Should the protest be granted?

- a) No – SAIC certified that there were no OCI's and that it would follow 9.5 if any arose.
- b) No – there were no hard facts showing an OCI.
- c) Yes – the contracting officer should have made an independent determination.
- d) Yes – SAIC should be disqualified, and the contract should be awarded to The Analysis Group.

## A1 - Lessons

- An agency must make its own independent OCI determination – it may not delegate that responsibility to the contractor.

# OCI Decisions - Procedural

Scenario A2

The Unread Mitigation Plan

## A2 - The Unread Mitigation Plan

Should the protest be granted?

- a) No – the Navy followed the process set forth in the RFP
- b) No – AT&T's affiliate supplied similar products
- c) Yes – the Navy did not comply with the FAR
- d) Yes – the Navy did not comply with the RFP

## A2 - Lessons

- Before disqualifying firm, agency must consider whether potential OCI can be mitigated.
- Ambiguous RFP implied that Navy would follow “due process” requirement.
- Navy did not comply with FAR – but was that protest ground timely?

# OCI Decisions - Forums

- Court of Federal Claims - independent protest jurisdiction.
  - “Two bites at the apple.”
  - GAO decisions – deference, but not binding.
  - Can lead to time-consuming and convoluted OCI process.
- GAO = legislative branch agency, so GAO decisions are “recommendations.”
  - Agencies usually follow recommendations.
  - Failure must be reported to Congress.

# OCI Decisions - Procedural

## Scenario B1

### Who Decides (Act One)

## B1 – Who Decides? (Act One)

Did the Turner team have an OCI?

- a) Yes – CO did not do a timely OCI review.
- b) Yes - AECOM and Ellerbe were functional “affiliates” once they started negotiating.
- c) No – any OCI was adequately mitigated.
- d) Yes – CO did not do adequate review.



## B1 – Lessons from GAO

- GAO will not overturn agency's determination except where it is unreasonable. (But did they?)
- When firms negotiate possible acquisition, their interests are effectively aligned for OCI purposes.
- Not reasonable for agency to rely on firewall mitigation plan that was undisclosed, unevaluated, and unmonitored.
- If firm was in a position to affect the competition in favor of itself, harm is presumed.

# OCI Decisions - Procedural

But Wait, There's More!!!

Scenario B1

(Act Two) Who Decides?

## B1 – Who Decides? (Act Two)

Should Turner's CFC protest be granted?

- a) Yes – GAO did not give proper deference to the contracting officer's decision.
- b) No – GAO “recommendations” are not appealable.
- c) No – The CoE did not act irrationally in following a GAO recommendation.
- d) No – the contracting officer's decisions was after the fact.

# B1 – Lessons from COFC

- If GAO recommendation is irrational → Agency decision to follow it lacks rational basis.
- So CFC must decide whether GAO recommendation was irrational.
- To overturn CO decision, GAO must identify “hard facts.”
- OCI based on affiliation must involve direct financial benefit.
- GAO ignored agency’s analysis → GAO lacked rational basis for decision.
- Bottom line: If judges can’t agree, how can we mere mortals know what to do?

# OCI Protest Trends

- Between 2009 and 2011, Federal Circuit decisions sent a “steady drumbeat about the deference to be shown to the contracting officer.”
- Since then, most (but not all) OCI protests have been denied. Why?
  - Federal Circuit guidance
  - CO doing better jobs? Maybe, but ...
    - Some decisions came after corrective action
    - Some CO reviews came after protests
- Remember
  - Real success is not: winning every protest
  - Real success is: avoiding need for protest



## OCI Decisions - Substantive

- Unequal Access to Information OCI
- OCI if offeror has access -- Actual use does not have to be shown.
- “Natural advantage of incumbency,” by itself, will not create OCI.

Protestor must show that awardee was “so embedded in the agency as to provide it with insight into the agency’s operations beyond that which would be expected of a typical government contractor.” (ARINC)

- Access by team member can create OCI.
- Information from former Government employee can create OCI. (Per FAR 3.1)
- Complying with post-employment restrictions may not avoid OCI issue.

# OCI Decisions – Unequal Access

## Scenario C1 The Chief of Staff

## C1 – The Chief of Staff

Should the protest be granted?

- a) No – hiring a government employee does not create an unequal access to information OCI.
- b) No – there were no hard facts showing wrongful disclosure of information.
- c) Yes – the contracting officer should have made a determination.
- d) No – the contracting officer was not aware of the issue prior to contract award.



# C1 – Lessons

- Use on proposal of former government employee may create an unequal access to information OCI.
- If access, unfair competitive advantage is presumed.
- CO must consider whether awardee who hires former government employee has unfair competitive advantage.
- Contractor: screen for issue in hiring process, provide guidance to employee, and disclose to CO.
- Agency: Should CO follow up when official leaves agency?

# OCI Decisions – Unequal Access

Scenario C2

Was There Inside Information?

## C2 – Was There Inside Information?

Should the protest be granted?

- a) No – CO did reasonable OCI analysis.
- b) No – no hard facts showing wrongful disclosure of information.
- c) Yes – Calnet had unequal access to information OCI
- d) Yes – Calnet may have had unequal access to information OCI.

## C2 – Lessons from COFC

- If agency conducts detailed investigation and concludes that no OCI existed, mere suspicion of OCI, without more, is not enough to establish that OCI exists.

# Mitigating Unequal Access OCIs

- Firewall blocks flow of information to proposal team.
- No competitive advantage if information cannot cross firewall.
- Firewall should be implemented and approved in advance.
  - Training, NDA's
  - Document control
  - Geographic/physical/organizational/separation
  - Job mobility restrictions
  - Assignment of responsibility



## Mitigating Unequal Access OCIs

- Alternative strategy: distribute non-public information to all offerors
- May be appropriate
  - if firewall won't work (too late)
  - if agency wants all offerors to see information
- Caveats
  - Agency must be willing to make information “public.”
  - Offerors must receive information in timely manner.

## Procurement Integrity Act and OCIs

PIA prohibits contractor from obtaining (from Government) “Contractor Bid and Proposal Information” and “Source Selection Information.”

OCI and PIA concerns overlap, but

- can have OCI without violating PIA (e.g., information properly obtained by performing contract)
- can violate PIA without OCI (information improperly obtained but no competitive advantage)

## OCI Decisions – Impaired Objectivity OCI

- Based on contractor's other government contracts or commercial business interests.
- Test: would reasonable person find that contractor's objectivity could have been impaired.
- Not OCI if relationship is "remote."
- Not OCI if activities are "ministerial."



# OCI Decisions – Impaired Objectivity OCI

## Scenario D1 The Pulled Punches

## D1 – The Pulled Punches

Should the protest be granted?

- a) No – GAO should defer to CO’s determination.
- b) No – EMS contract would not affect FITS contract, and vice versa.
- c) Yes – SRA would have incentive to “pull its punches.”
- d) No – mitigation plan provided for appropriate safeguards (including agency oversight and firewall).

## D1 – Lessons

- OCI if contractor's exercise of judgment on contract A might affect its past performance evaluations on contract B.
- Firewall will not mitigate impaired objectivity OCI.
- Mitigation based on government oversight must be described and credible.
- Waiver might have been appropriate.

# Mitigating Impaired Objectivity OCIs

- Firewall is not enough.
- Can excluding work from conflicted subcontractor or employee.
- Can assigning work to firewalled subcontractor (or agency).
  - May increase government oversight burdens.
  - Sub must be independent.
  - Prime loses some control
- Careful agency oversight of work.
- Standardization of evaluation procedures.
- Corporate separation or divestiture where OCI is based on work being performed by affiliate.

# Mitigating Impaired Objectivity OCIs

- Prevention: Suppose SOW includes potential Impaired Objectivity OCIs – e.g., evaluate future actions or submissions under contracts that have not yet been awarded?
- Mitigation plan could provide that:
  - Contractor will not be assigned such work
  - Contractor will be permitted to decline that work
  - Contractor will be permitted to assign work to firewalled subcontractor.
  - Contractor may perform, subject to enhanced government monitoring.
  - Contractor will divest (or reduce financial interest in) affected part of business, or be divested from parent.

## OCI Decisions – Biased Ground Rules OCI

- OCI if offeror seeks to provide system (or components) for which it previously provided SETA services or contributed to specifications or statement of work.
- Test: did information lead “directly, predictably, and without delay” to statement of work.
- Presumption: was company in position to affect competition in its own favor.
- Bias may be unintentional

# OCI Decisions – Unequal Access

## Scenario E1

### No Good Deed Goes Unpunished

## E1 – No Good Deed Goes Unpunished

Should the protest be granted?

- a) Yes – feasibility study not prepared for solicitation.
- b) Yes – no showing that specifications favored Basile.
- c) Yes – information supplied did not lead “**directly, predictably, and without delay**” to statement of work.
- d) No - information supplied did lead “**directly, predictably, and without delay**” to statement of work.



## E1 – Lessons

- Different purpose doesn't immunize SOW, cost estimate from creating OCI. (“Feasibility study” may become SOW.)
- Test: did information lead “directly, predictably, and without delay” to statement of work.
- Test: was company in position to draft favorable specifications.
- COs should communicate with CORs!

# OCI Decisions – Unequal Access

## Scenario E2

No Good Deed Goes Unpunished,  
revisited

## E2 – No Good Deed Goes Unpunished, Revisited

Should the protest be granted?

- a) Yes – COR permitted to request information bearing on contract performance.
- b) Yes – no showing that specifications favored Ressler.
- c) Yes – Ressler did not tailor information for competition.
- d) No - information supplied led “**directly, predictably, and without delay**” to statement of work.

## E2 – Lessons

- May exclude offeror who unknowingly provided input into SOW.
- Warning flag: COR requests information about contract performance near end of contract term. Why?

# Mitigating Biased Ground Rules OCIs

- Difficult to mitigate.
- Once party has influenced specifications, harm has already been done.
- Strategies to avoid future OCIs:
  - Obtain input from multiple potential contractors. (E.g., RFI)
  - Contract allows contractor to avoid (no bid) tasks that might create future conflict.

## Business Decision

Contractor may have to choose between “a bird in the hand and two birds in the bush” – i.e., either:

- Perform contract (e.g., that includes specification development tasks) and forego related future work, or
- Forego this contract, in hope of winning of future business.



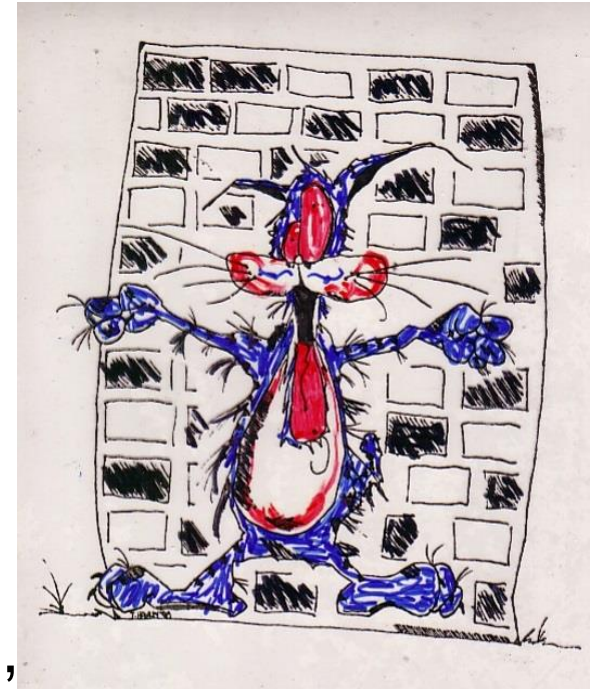
## OCI Decisions - Mitigation

- Many protest decisions turn on mitigation plan.
- Purpose: reduce (or eliminate) impact of real or potential OCI.
- Difficult to mitigate OCI after-the-fact, so
- Plan should must address prospective OCIs.
- GAO will defer to mitigation plan if
  - agency has investigated and dealt with issues
  - plan is tailored to specific situation.

# OCI Decisions - Mitigation

Some OCIs cannot be mitigated, even with government approval.

Aetna Gov't Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129 (where consultant helped agency evaluate proposals, including proposal from team that included consultant's affiliate, impaired objectivity OCI could not be mitigated, notwithstanding agency's acceptance of awardee's mitigation plan)





## Cases – the Bottom Line

- You don't want to be a plaintiff/protester
- You don't want to be a defendant/intervenor
- You just want to
  - Award your contract
  - Perform your contract
  - Accomplish your mission
  - Make a profit



# 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!**

# Past Attraction - Draft FAR OCI Rule or “Waiting for Godot”

- Issued April 26, 2011, in response to Duncan Hunter National Defense Authorization Act for FY 2009.
- Divides FAR Part 9.5 two sections:
  - OCI coverage (Impaired Objectivity, Biased Ground Rules) into Part 3 = “Business Ethics and Conflicts of Interest”
  - Unequal Access to Information OCI into Part 4 = Administrative Matters
- Emphasizes OCIs that affect integrity of procurement (Biased Ground Rules)
- Allows discretion where OCI affects only Government’s business interests (Impaired Objectivity).

# Proposed Rule – New Wrinkles

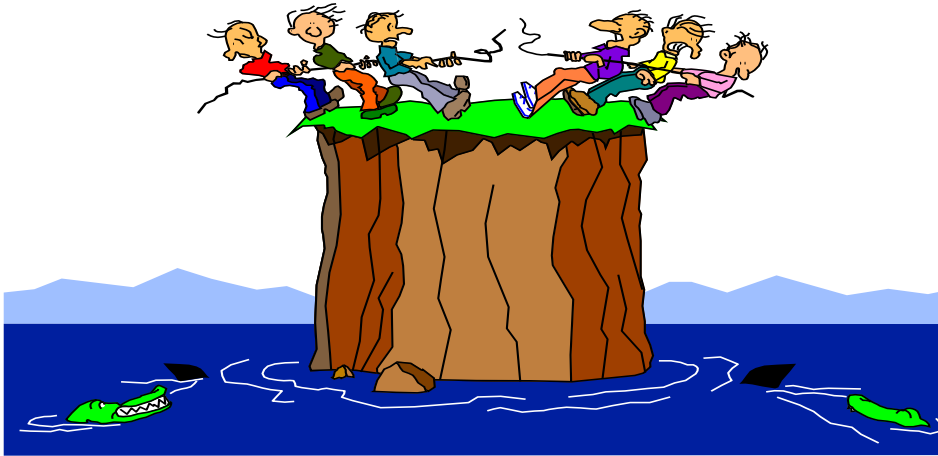
- Corporate barriers between affiliates.
- Incorporate mitigation plans into contract.
- If only risk is to government (Impaired Objectivity OCI)
  - CO can accept risk
  - OCI include risk as evaluation factor
- Program office identifies contactor(s) that had input into solicitation or are prohibited from competing.
- Task order contracts
- OCI and Mitigation plan can be evaluation factor
- Model clauses

# Unequal Access to Nonpublic Information

- Remember current rule: companies negotiate NDA, CO gets copy.
- Propose rule uses contract clauses
- Awardee agrees
  - to use info only for purposes of contract
  - to get NDAs from employees
  - to indemnify government
- Third-party information provider agrees that information can be released to contractors who sign access clause
- Avoids need for multiple non-disclosure/access agreements

# Organizational Conflicts of Interest

## THE PRACTICE



## Pre-solicitation Period

- CO: Consider potential OCIs when preparing acquisition plan.
  - Work with program, technical, legal personnel
  - Identify contractors with input or limitations
  - Document (and publish?) “no-OCI” finding
- Determination depends on work statement.
- Should you use categorical resolutions?
- Is it staged acquisition?

## Identifying OCIs – Sources of Information

- RFP should require relevant information re business relationships, other related contracts
- Quality > quantity



# Independent Fact Finding

## Potential government sources

- Contracting office files, knowledge
- Other government offices (audit, program)



## Public sources

- Websites
- Trade associations, industry forums, RFI's
- Publications, trade and financial journals
- Lexis/Nexis, Google Search
- Shareholder reports, SEC filings

# Identifying OCIs

**When we consider possible OCIs, we should consider two questions:**

- Do we already have an OCI with respect to the current procurement?**
- Will this award create an OCI in future competitive procurements?**

# Identifying OCIs – General Questions

[Note: agency can change pronouns]

- What other contracts, including GWACs, do you (or team member) currently have or recently had with the agency?
  - acquisition support or contract management?
  - similar subject matters?
- What contracts do you or a team member expect to pursue in the future?
- Will this award create future OCI?
- Does solicitation advise offerors of any future limitations?

# Identifying OCIs – General Questions

- Family or business relationships with agency employees?
- Prior CO discussions or assurances
- Is there a merger or acquisition in process?
- Could other company be affected by your performance of this contract or vice versa?
- Your ownership and business affiliations?

## Identifying Unequal Access OCIs

- Have you (or an affiliate or team member or “marketing consultant”) had access to non-public information that provides competitive advantage?
  - Was the Government the source?
  - Who has seen at this information?
  - Is there a firewall between those with access and the proposal team?
  - What are its elements?

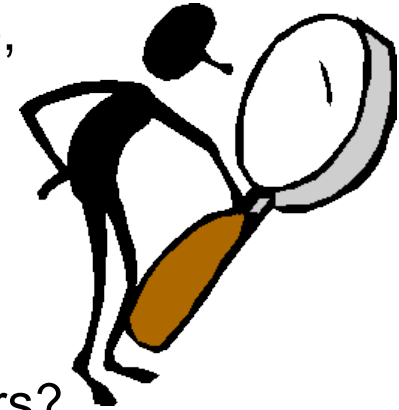
# Identifying Unequal Access OCIs

- Former Government Employees: Have you recently hired agency employee:
  - who participated in solicitation planning
  - who had access to non-public solicitation information
- Have you taken steps to ensure they do not give you access to non-public information concerning the procurement?
- Future: If you perform this contract:
  - Will your team have access to non-public information that might give it future competitive advantage?
  - Does RFP flag this issue and any required mitigation?



# Identifying Impaired Objectivity OCIs

- Does SOW include advice or recommendations, or subjectivity?
    - Language in SOW (e.g., analyze, study, advice, recommendations, strategies?)
    - Key personnel and educational requirements?
    - Auditing or quality assurance activities?
    - User fee collection or litigation activities
  - Will contractor be evaluating affiliates or competitors?
  - Could your input benefit yourself (or affect competitor)?
  - Can areas that raise OCI issues be segregated and performed by another team member, or by the agency?
- Future: Does SOW include future procurement area that contractor may wish to pursue? Does RFP flag this issue?



# Identifying Biased Ground Rules OCIs

- Has your team had input into
  - specifications, SOW, or testing or performance standards?
  - evaluating or recommending products, systems, or design descriptions?
- Could your input benefit contractor in competition?
- Were you asked for your work processes or job descriptions near end of your contract?
- Were you asked to provide information about current contract (job descriptions, processes, etc.) used in this procurement?
- Have you performed SETA work for agency?
- Future: Will contract include
  - SETA work
  - support for agency's procurement function?
  - input into specifications or SOW
- Does the RFP flag this issue?



# Mitigating OCIs

Choice of mitigation strategy is highly fact-dependent, varying with:

- Specific contract details
- Contractor's goals
- OCI type
- Potential OCI issues
- Agency's general policies and approaches. (What strategies will they approve?)

**One size most definitely DOES NOT FIT ALL.**

**GOAL: A Plan you can live with THAT THE CONTRACTING OFFICER WILL APPROVE!**

# OCI Mitigation Plans - Content

- Description of relevant part of offeror's business.
- Description of offeror's affiliations and financial interests in other entities.
- List and description of other related contracts
  - with same agency; or
  - involving same products and services.
- For each contract, discussion of any possible OCI issue or explanation of why contract does not raise any OCI issues.
- Any proposed mitigation steps that offeror will take.
- **Don't just repeat "ipse dixit" mantra that "Plan will avoid or mitigate potential OCIs."**

# OCI Mitigation Plans - Content

Content of plan depends on particular mitigation strategy:

- If firewall, discuss organization and management chains.
- If reorganization, provide detailed description of how this will be accomplished
- Identify compliance records that will be made available to agency upon request
- Provide robust description of how plan will be administered and implemented – i.e., education and training, certifications, assignment of responsibilities, etc.

# OCI Mitigation Plans - Key

- **Did you follow the Plan?**
- **Can you prove that you did – i.e., was your performance auditable?**

## Lessons Learned – Contractor (1 of 4)

- Communicate with agency about possible OCIs early. Make CO comfortable with mitigation plan.
- Seek clarity. Request written approval of Mitigation Plan, or waiver of potential OCI.
- Don't try to hide your head in the sand. If there is an OCI issue, it will surface.
- Communicate internally. One business team can unknowingly create OCI for another team.
- Involve business and sales teams in developing mitigation plan, to make sure it is realistic and can be followed.



## Lessons Learned - Contractor (2 of 4)

- Consider developing a company-wide OCI plan.
- Consider establishing “OCI Officer” or multi-disciplinary “OCI Team.”
- Develop standardized firewall process and procedures.
- Be careful when procurement opportunity will go into new areas.
- Assess OCI potential early during M&A due diligence.
- Consider OCI’s when negotiating teaming and JV arrangements.
- Perform OCI review when hiring former government employees.
- If you think competitor has OCI, consider alerting agency. If agency advises that competitor will be eligible, you must file a timely protest or “forever hold your peace.”

## Lessons Learned – Contractor (3 of 4)

- Don't make mitigation plan too complicated to understand or monitor.
- Mitigation plan should include assignment of responsibility, training, certification, and internal audit provisions.
- Mitigation Plans must be substantive.
- Don't just repeat plan's goal; describe how it will achieve it.
- Task order RFP's should be reviewed for potential OCI's.
- Be wary if SOW appears to have been taken from your own submissions.
- Be wary of requests for information (job descriptions, staffing levels, work plans) that may be included in future procurement.

# Lessons Learned – Contractor (4 of 4)



Front line OCI defense lies in employees (especially if they support agency’s procurement function or are located at government site) who have access to information, are asked for input into specifications, or provide advice to government. They must learn to avoid OCI situations, and ask themselves:

- “Is this in-process review turning into discussion of follow-on procurement?”
- “Am I being asked to provide information or advice, or take an action, that might help my company (or hurt a competitor) in future competitions?”
- “Am I being asked to give input or information that might go into a future government procurement?”
- “Could my decisions affect the interests of my company?”
- “Have I received/reviewed proprietary information belonging to a competitor?”



## Lessons Learned – Government (1 of 6)

Consider treating OCI as selection criterion

- Eligibility criteria are pass/fail. If plan is not acceptable, no award. Communications (to clarify plan) are not discussions.
- Evaluation criteria lets Government consider OCI risk, especially where:
  - Umbrella contract → Task orders (if OCI's likely)
  - OCI remedies would be burdensome (e.g., divestiture).

## Lessons Learned – Government (2 of 6)

- Disclose company-specific OCI determinations in solicitation:
  - Companies that are excluded
  - Companies that will be permitted to compete
  - Measures agency has taken to mitigate conflicts
- Avoids “gotchas”
- Allows time to consider challenges and issues
- Facilitates industry “buy-in”
- Post-award protests will be untimely
- Pre-award protests are less likely and less disruptive.

## Lessons Learned – Government (3 of 6)

- Include future restrictions in RFP.
- Avoid being categorical.
- Include Program/requiring technical organization throughout process:
  - they may have important information
  - they may be able to redefine requirements to avoid conflicts
- Early attention:
  - gives CO flexibility
  - allows potential offerors to make sensible bid/no-bid decisions

# Lessons Learned – Government (4 of 6)

- Don't overdo!
  - Ask offerors for important, relevant information. Requiring more will needlessly burden both offerors and agency.
  - Don't insist on plan that is too cumbersome to successfully implement and monitor.
- Document your investigation and findings!!!
- Consider appropriate use of waiver authority.



## Lessons Learned – Government (5 of 6)

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 recognize situations where OCI issues can arise, and should not:

- Share procurement-related or proprietary information with contractors who do not have a bona fide need to know.
- Reflexively send emails, documents, or other review information to ill-defined distribution lists.
- Allow contractors to participate unnecessarily in meetings that morph into discussions of future procurement plans or share sensitive procurement-related information.
- Ask contractors for advice beyond requirements of contract.

• Use contractor-supplied information in solicitations.

## Lessons Learned – Government (6 of 6)

- No algorithm – OCI issues are heavily fact dependent.
- There is value in predictability.
- Reason you want contractor to perform work may be precise reason why there is OCI that cannot be mitigated. Catch-22!
- Balance:
  - potential for biased judgment v. effect of exclusion on future competition,
  - need for objectivity v. with need to attract experienced experts.

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