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Professor's Forum

Organizational Conflicts of Interest: Developments and Trends

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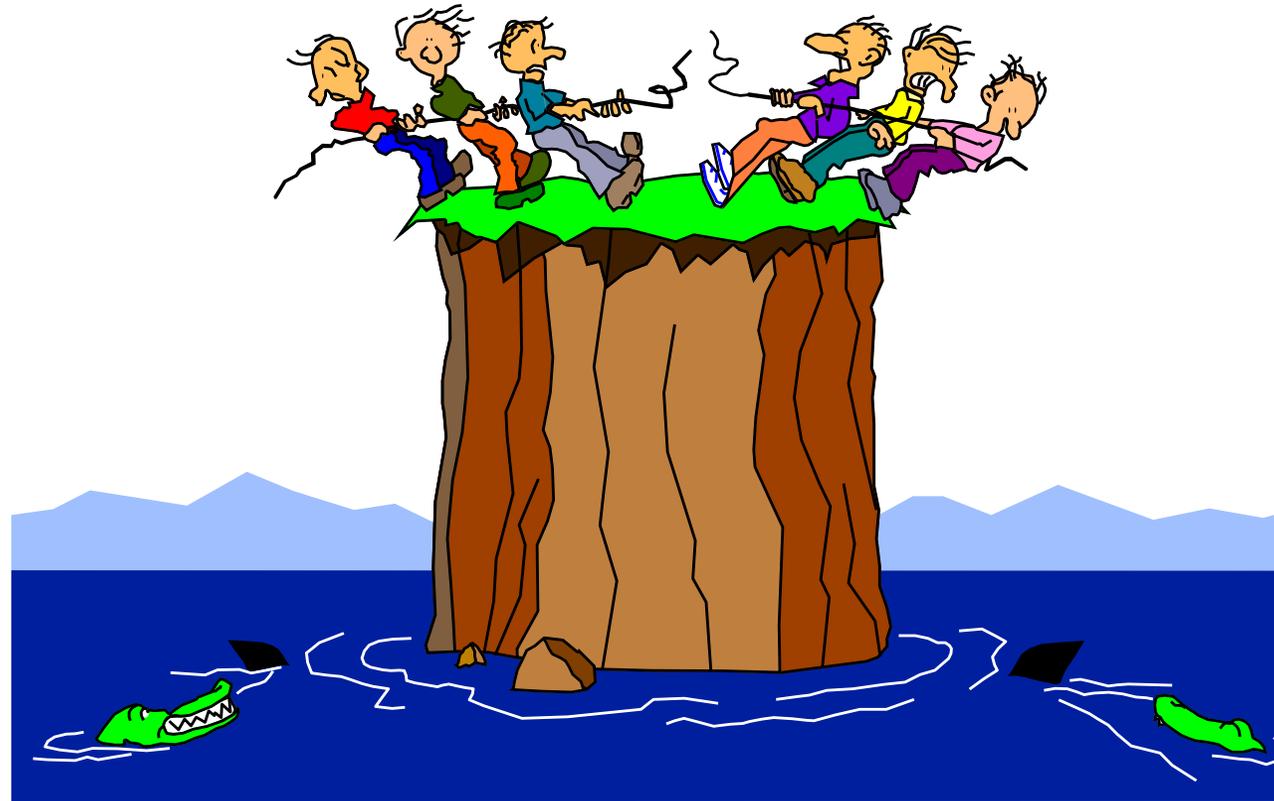
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- Prior experience includes 21 years at Electronic Data Systems Corporation, including Director of Contracts and Legal for EDS Federal.



OCI Forum

- **Refresher: OCI Basics**
- **Discussion of recent OCI case law trends**
- **“Waiting for Godot”: What might we expect in the proposed rule?**
- **Best practices**

OCI BASICS



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.”

Three Kinds of OCIs

- **Unequal access to information**
Unfair competitive advantage
- **Impaired objectivity**
Bias contractor's judgment
- **Ability to set biased ground rules**
Both

Unequal Access to Information OCI

- Offeror has access to proprietary information, source selection information, or other non-public information that may give it an unfair competitive advantage over other offerors.
- Actual use does not have to be shown.
- Information received must be real and substantial.
- Experience/expertise is considered a “natural advantage of incumbency” and will not, by itself, create OCI.
 - **But may be OCI** if incumbent has nonpublic information (e.g., source selection information) that gives it *unique insight* into bidding or evaluation process.
- Access by team member can create OCI.
- Information from ex-Govt employee can create OCI.
 - Complying with post-employment restrictions may not avoid OCI issue.



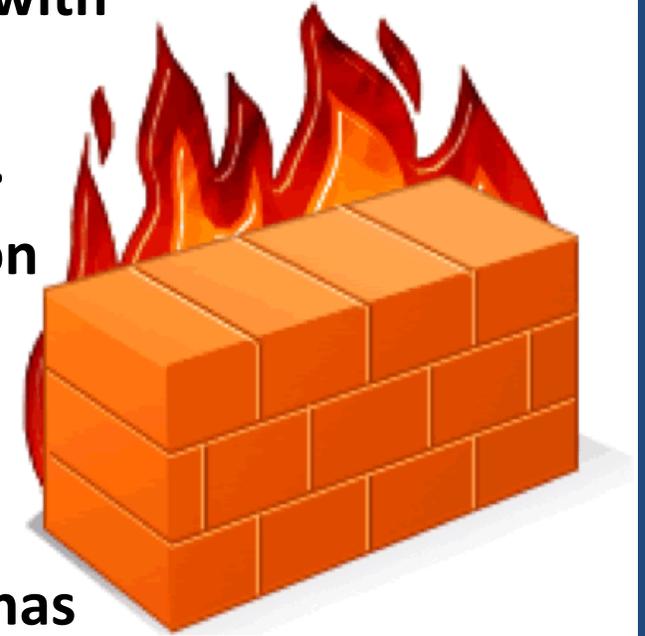
Mitigating Unequal Access OCIs

- **Firewall:**

- **Block flow of information to proposal team, from those with access to non-public competitive information.**
- **Should be approved in advance by CO, and documented.**
- **Potential competitive advantage is nullified if information cannot be used in competitive procurement.**

- **Disclosure:**

- **Share sensitive information with all offerors.**
- **Potential competitive advantage is nullified if everyone has information.**
- **Must be timely.**



Impaired Objectivity OCIs

- Contract gives contractor ability to benefit its other government contracts or commercial business interests.
- Example – if contractor, under one *government contract*, is required to evaluate work:
 - it performed under another separate contract
 - performed by a separate entity in which it possesses a financial interest
 - performed by a competitor
- Government’s primary concern is that economic pressures and consequences will bias contractor’s judgment
- Test: would reasonable person find that contractor’s objectivity could have been impaired. If so, OCI is presumed.



Mitigating Impaired Objectivity OCIs

Firewall is not enough; it must be combined with:

- Excluding work from, or even removing, conflicted subcontractor.
- Assigning work to firewalled subcontractor, or even agency itself.
 - “Firewalled subcontractor” solution may increase government oversight burdens; Government must oversee performance of two parties and cannot look to single point of responsibility
- Careful agency oversight of work.
- Excluding tasks that require contractor to exercise judgment.
- Possible corporate separation or divestiture.
- Worst case: Contractor may have to choose between “a bird in the hand and two birds in the bush.”



Biased Ground Rules OCIs

- Offeror seeks to provide system (or components) for which it previously contributed to specifications or statement of work or provided SETA services. Contractor could
 - gain an unfair advantage in the competition through its knowledge of the agency's future requirements
 - skew the competition
 - in its own favor (unfair competitive advantage), and
 - not in the government's best interests (impaired objectivity)
- Test is whether the information supplied led "directly, predictably, and without delay" to statement of work.
- Test: was company was in position to affect competition, intentionally or not, in its own favor.

Mitigating Biased Ground Rules OCIs

- **Very difficult to mitigate after the fact - once party has influenced specifications, harm has already been done.**
- **Strategies to avoid future OCIs:**
 - **Exclude tasking that could create future OCIs.**
 - **Obtain input from multiple potential contractors, or use contractor as “industry representative.”**
 - **Allow contractor to decline tasking that might create future conflict (as long as agency has other ways to meet requirement).**



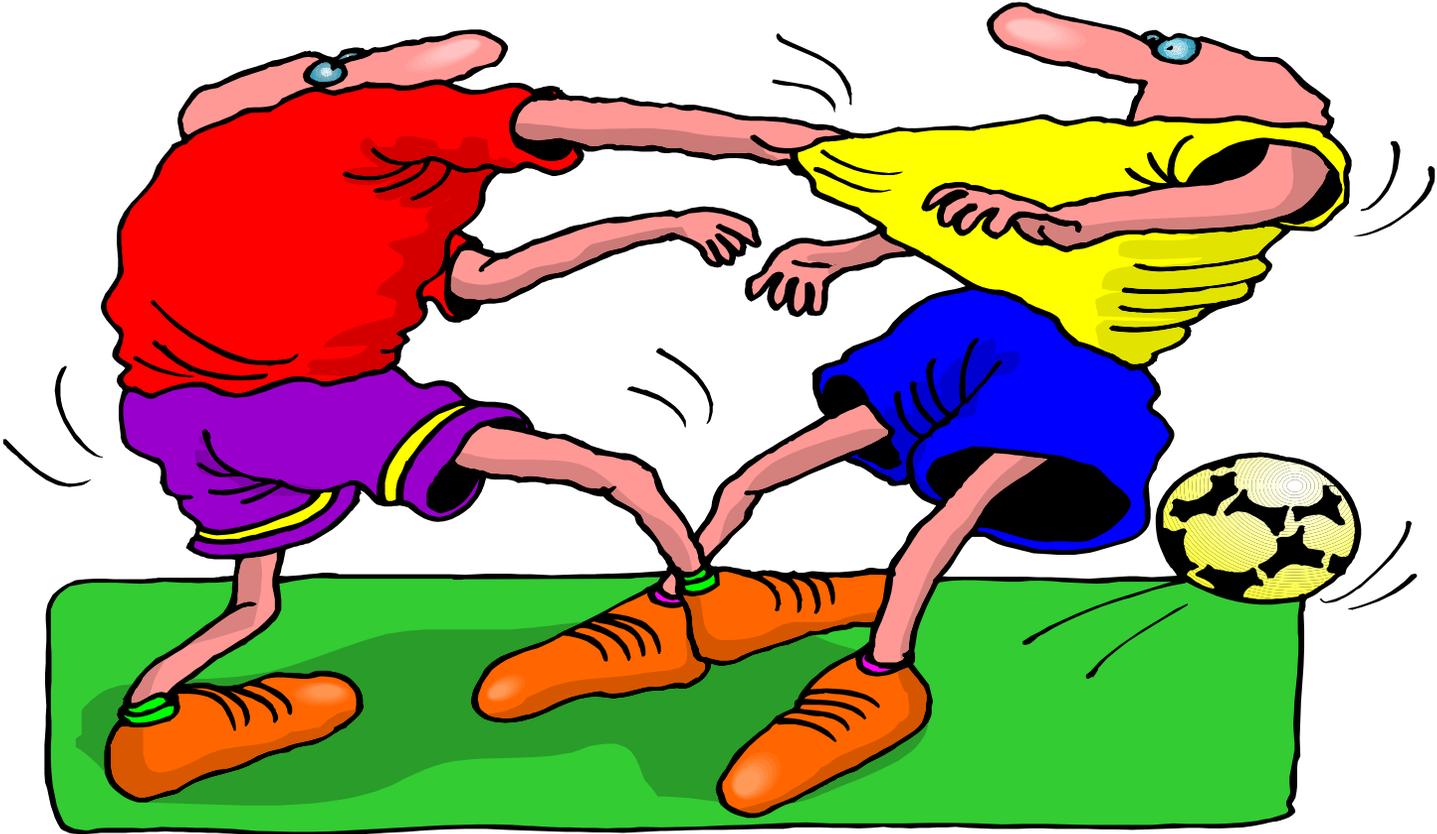
FAR 9.5 – Contracting Officer’s Responsibility

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.”
- Seek OCI 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.

“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

CASE LAW TRENDS



Trend in Federal Circuit

- **Recent Federal Circuit decisions send a “steady drumbeat about the deference to be shown to the contracting officer.” (GAO Managing Associate General Counsel, at 2012 Year In Review Conference)**



Trend in Federal Circuit – Axiom (2009)

- CO found awardee’s mitigation plan was sufficient to protect government against OCI.
- GAO found contracting officer’s “extensive” analysis and decision reasonable and denied protest.
- Protester then sought injunctive relief at COFC.
- COFC found plan insufficient, and ordered independent auditor to be put in place to audit mitigation plan. When agency refused, COFC enjoined contract renewal.
- Federal Circuit reversed COFC, holding contracting officer’s decision should be reviewed under “arbitrary and capricious” standard rather than “de novo.”



Trend in Federal Circuit – PAI (2010)

- Department of Energy mitigated unequal access OCI by disclosing some information and determining that other information known to awardee was stale and not competitively useful.
- COFC dismissed complaint that CO did not document potential OCI, finding that CO had discretion to find that OCI was “not significant.”
- Federal Circuit denied appeal: Court will not overturn contracting officer’s decision unless it is arbitrary, capricious, or otherwise contrary to law, as demonstrated by “hard facts.”



Trend in Federal Circuit – Turner (2011)

- After Army awarded contract to build Army hospital, parent of design contractor announced acquisition of subcontractor on winning “build” team.
- GAO overruled contracting officer and granted protest, recommending that awardee be excluded. Army followed recommendation, and awardee protested to COFC.
- COFC found that GAO had not followed its own “deferential” standard and granted awardee’s protest.
- Federal Circuit affirmed: “When a [contracting] officer’s decision is reasonable, neither a court nor the GAO may substitute its judgment for that of the agency.”



Trend in Protests

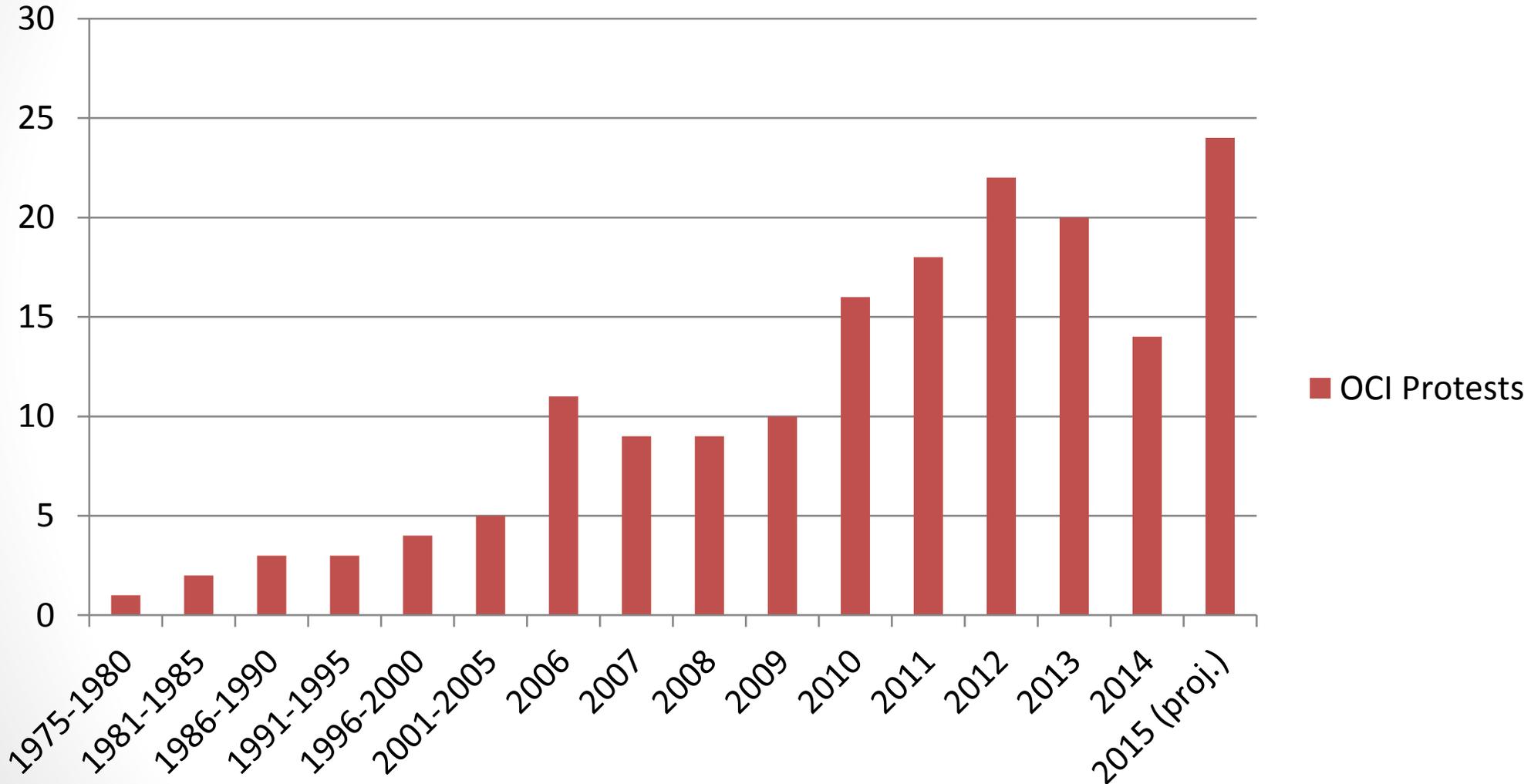
- Since February 2012, more than 50 OCI challenges have been decided at GAO. In nearly every case:
 - CO found no disqualifying OCI
 - GAO denied protest and upheld CO's decision

What is the explanation?

- Are we back to pre-CICA “good old days” (or “bad old days”) when the CO was the OCI Sheriff: “I am the law in this town”?
 - NO!
- Is this a response to the Court of Appeals “study drumbeat?”
 - Yes, at least in part: Legal bar is clearly higher.
 - “Hard facts” (not mere innuendo or suspicion) are required before an OCI should be considered disqualifying or before a contracting officer's decision should be overturned

Trend in GAO OCI Challenges (est.)

OCI Protests



Why Are OCI Protests Still Being Brought?

- If odds are so long, why are protesters still bringing OCI challenges at a record pace?
 - Maybe it's because many contracting officers are not getting it right the first time.
 - Many OCI challenges followed prior agency “corrective actions” that (at least temporarily) resolved earlier OCI protests (which were dismissed).
 - Many other contracting officer determinations that GAO ultimately endorsed (or at least deferred to) were made after, not before, OCI protests were filed.
 - GAO is not merely rubber stamping CO decisions - GAO OCI decisions typically include lengthy reviews and analyses of the CO's detailed investigation and analysis.
- So yes, contracting officers are getting it right, but sometimes only because protesters are forcing them to.
- **Interesting Examples in Past Six Months:**

International Resources Group

- International Resources Group (December 2014) snapped CO's winning streak at GAO.
- USAID awarded 6 IDIQ contracts for water and development services.
- Protestor challenged awards on multiple grounds.
- GAO sustained ground with respect one awardee, which had hired former director of USAID Office of Water, the procuring agency, during procurement.
- Agency conducted no contemporaneous investigation. After protest filed, CO investigated and concluded ex-Director had no access to non-public information and did not participate in evaluation.
- GAO found hard facts that contradicted CO's conclusions. Ex-Director had helped draft SOW, was involved in procurement after he claimed otherwise, and helped select members of evaluation committee.
- GAO sustained protest.

Maximus and Q2

Protest decisions considered “structural barriers” between affiliates.

- **Protests in Fall 2014 against the same awardee on similar CMS procurements for “Qualified Independent Contractors.”**
- **QICs conduct reconsiderations of claims determinations and are required to be independent of those whose determinations the QIC is reviewing.**
- **Awardee’s parent is “Quality Improvement Organization” contractor, which provides claims data and statistics to CMS.**
- **Protest: “parent will have incentive to manipulate data to benefit subsidiary.”**
- **CO investigated awardee’s relationship with parent organization, which operated as different company with separate board of directors and senior management, geographically distinct corporate operations and separate computer and information technology systems, and concluded that independence requirements was satisfied and any link between activities of parent and increased work to subsidiary was technically unfeasible, very remote, and extremely unlikely.**
- **GAO: CO reasonably concluded that no conflict exists.**

International Business Machines (1/15)

- DLA issued RFP for IDIQ contract to update retiree pay system.
- IBM planned to use Booz Allen Hamilton as team member.
- BAH subcontractor (Horizon) employee had helped develop solicitation. Horizon employee had NDA that prevented giving non-public information to IBM or BAH, and his employment was to be terminated.
- DLA found that while Horizon employee was helping DLA develop solicitation, BAH expressed interest in competing for the work.
- Horizon employee was in position to tilt competition, intentionally or not, in favor of BAH, and there was “no basis to distinguish between firm and its affiliates.”
- Termination of employment came too late to cure potential biased ground rules OCI, because “once a party has influenced the specifications, the harm has already been done.”
- DoD excluded IBM from competition, and IBM protested. GAO found DoD’s decision was reasonable.
- In protest, IBM claimed that BAH subcontractor employee was not aware of BAH’s interest in procurement. GAO: This was not disclosed to CO. In effect, CO/GAO imputed knowledge of BAH’s marketing plans to employee of Horizon, without asking!

Monterey (March 2015)

- VA issued task order under Federal Supply Schedule.
- Post-award protest claimed that awardee employees had access to non-public procurement-related information (work statements, government estimates) through their performance of prior contract .
- Awardee argued that employees had executed NDA's and had not disclosed information, most of which was ultimately released publicly, so there was no competitive advantage.
 - **In effect, “no harm, no foul.”**
- CO found unmitigated potential OCI, and awardee had not submitted mitigation plan – fatal flaw. After-the-fact plan was not sufficient.
- Also, evidence contradicted the “no harm” claim.
- Contracting officer's decision to rescind award was rational.

What's the Bottom Line?

- Losing offerors are still raising OCI challenges.
- Contracting officer OCI decisions are being upheld, but in many cases only after OCI issues that could have been resolved earlier are addressed in protests.
- Is this a success?
 - Protest that is denied will still delay performance.
 - Which is better: winning 39/40, or winning 0/0?
- **Real success is not: winning every protest**
- **Real success is: avoiding need for protest**
- Contractor: think twice before you spend resources on an OCI protest, unless you have “hard facts.”
- Contracting officer: be proactive. Address OCI issues fully and early.

DRAFT FAR OCI RULE

or

“Waiting for Godot”



Draft FAR OCI Rule

- **Current OCI regulations (FAR 9.5) largely unchanged since 1984, adapted from ASPR regulation in 1960's**
- **Duncan Hunter NDAA for FY 2009, Sec. 841, required review of FAR OCI coverage**
- **Proposed rule issued April 26, 2011**
- **Later drafts not made public**
- **Per "Open FAR cases" April 6, 2015 update:
"04/02/2015 – DAR staff notified FAR staff that DARC agreed to draft final FAR rule. Awaiting CAAC concurrence."**

Draft FAR OCI Rule

Provisions of draft rule can be grouped into three “buckets”:

- Provisions that add or suggest new wrinkles and strategies
 - (Note: Some can be implemented as “best practices,” whether or not they are in final rule.)
- Provisions that codify/implement current GAO/COFC “common law” rules
- Provisions that restate or supplement provisions in existing FAR Subpart 9.5

New Wrinkles/Strategies

Structural Change: Divides FAR Part 9.5 into two sections:

- **OCI coverage (Impaired Objectivity, Biased Ground Rules) moved into Part 3 = “Business Ethics and Conflicts of Interest”**
- **Unequal Access to Information OCI moved into Part 4 = Administrative Matters**



New Wrinkles/Strategies

- Where OCI affects integrity and fairness of acquisition (primarily “Biased Ground Rules” OCI):
 - Risk must be reduced or eliminated to maximum extent possible.

BUT. . . .
- Where OCI affects only “Government’s business interests” (primarily “Impaired Objectivity” OCI):
 - CO has broad discretion to assess OCI as acceptable performance risk
 - **This means Contracting Officer may accept OCI risk, without needing waiver from head of contracting activity, if CO determines that potential harm to Government resulting from OCI is outweighed by expected benefit of using this contractor.**



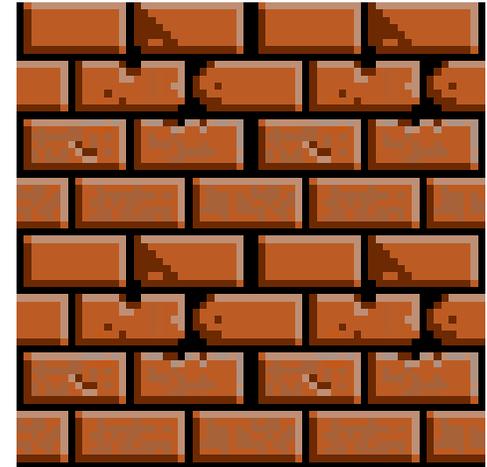
New Wrinkles/Strategies

Why the distinction? Consider whose interests are at stake.

- **Stakeholders include both Government and competitors.**
- **When only Government interests are at stake**
 - **Government should have right to accept or waive those concerns, on its own behalf.**
 - **Government can protect itself through monitoring and contractual remedies.**
- **When competitive process is involved**
 - **Government can't speak for competitors (at least not directly).**
 - **Competitors can't protect themselves through monitoring or other contractual remedies.**

New Wrinkles/Strategies

- **If exclusion is based on work done by affiliate, contracting officer should consider whether affiliate relationship can be mitigated by structural barriers – e.g.,**
 - **internal barriers**
 - **corporate resolutions**
 - **management agreements**
 - **restrictions on information or personnel**
 - **separate legal entities with separate boards of directors**
 - **limits to ability to influence performance.**



New Wrinkles – Best Practices

- **Task order contracts - Consider at awards of contract and task order.**
 - Some OCIs can't be evaluated until task order SOW is defined.
- **If only risk is to government's business interests, can include risk as evaluation factor in solicitation – i.e., not an “on-off switch.”**
 - Agency can consider risks and burdens of OCIs that may arise during contract performance.
- **Incorporate mitigation plans into contract.**
 - OCI mitigation requirements should be contractual. (In DFARS OCI Rule)
- **Program office identifies contactor(s) that participated in preparing SOW or requirements or cost estimates and identifies contractors prohibited from competing due to pre-existing limitations.**
 - Avoids “gotchas” where COR uses contractor input to draft RFP.

New Wrinkles/Strategies

Model Clauses that:

- **Provide notice that OCI may result from performance.**
- **Identify contractors who participated in preparation of solicitation.**
- **Require offerors to disclose information about existing or potential OCIs (and prior limitations).**
- **Require submission of mitigation plan (if appropriate).**
- **Require disclosure of any OCIs that are identified after award, with proposed steps to address conflict and update mitigation plan.**
- **Specify limitation on future contractor activities.**
- **Require flowdown when applicable.**

Codifying GAO/COFC Common Law

- **Contracting officer should assess mitigation plans and consider**
 - **Effectiveness**
 - **Feasibility**
 - **Government's ability to monitor**
- **Examples of acceptable mitigation plans:**
 - **Exclude tasks that require contractor to exercise judgment.**
 - **Require conflict-free team member to perform conflicted portion of work (behind firewall).**
 - **Firewall necessary but not sufficient (remember, unequal access to information OCI's are moved to Part 4)**

Restating FAR Rule

- **Definition of OCI**
- **Admonition to use business judgment because “every snowflake is different.”**
- **Due process requirement (Contractor must be given opportunity to respond before losing award on OCI grounds).**
- **Waiver requirement (needed only for biased ground rules OCIs).**
- **Guidance to contractors, including sources of independent OCI evaluation.**
- **Requirement to include future eligibility restraints in RFP.**
- **Examples? – Not included in initial draft rule, but apparently will be reinstated in final rule.**

Unequal Access to Information

Treated Separately

- Does not necessarily involve OCI
- Can arise from unrelated circumstances (e.g., hiring of former Government employee)
- Methods of addressing issue are different
- Key is to minimize contractual “taints” by providing advance safeguards on contracts that give access to information.
- Note: Process for contractor access to third-party proprietary information moved to new FAR case.

Unequal Access to Information

Definition of nonpublic information: any information that is exempt under law or as to which Government has not determined whether it will be made public.

- I.e., default position = NON-PUBLIC
- Model clause requires Contractor to disclose relevant nonpublic information in its (or employees' or sub's) possession.

Codifies common law:

- Restates incumbency issue.
- Elements: Was there access to information that was Government-provided, unequal, competitively useful, and provided unfair competitive advantage?
- Resolution – share information or use firewall.

Access to third party information

- Moved to new FAR case (2012-029).

If contractor requires proprietary information from others:

- **Process under current FAR**
 - **Variability:** Contractor negotiates confidentiality agreement(s) with information providers, and provides them to contracting officer.
 - Contractor agrees to protect information from unauthorized use or disclosure and refrain from using information for any other purpose.
- **Process under initial draft FAR Rule:**
 - **Uniformity:** Contractor agrees to Standard Clause that replaces confidentiality agreement(s)
 - Information provider(s) agree to allow information to be released to contractors who have agreed to restrictions in Standard Clause.
 - Information suppliers are third party beneficiaries

BEST PRACTICES



Contractor Best Practices

- **Don't hide your head in the sand. If there is an OCI issue, it will surface. Err on side of full disclosure - troubling issues should be highlighted and dealt with.**
- **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 area of business.**
- **Assess OCI potential early during M&A due diligence. (Turner case)**
- **Consider OCI's when negotiating teaming and joint venture arrangements.**
- **Perform OCI review and provide detailed guidance (re procurement input) when hiring former government employees.**

Contractor Best Practices

- **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

- **Early attention to OCI gives greatest flexibility and allows potential offerors to make sensible bid/no-bid decisions.**
- **Don't be categorical. This may take more effort and analysis, but it will lead to substantially improved competition and fairness.**
- **Include program/requiring technical organization throughout process.**
- **Disclose OCI determinations in solicitation (including both included and excluded competitors). Avoids "gotchas," reduces protest probability.**
- **Document your investigation and findings!!!**

Government Best Practices

- **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 information with contractors who do not need such information.**
 - **Send emails, documents, or other review information to ill-defined distribution lists.**
 - **Allow contractors to participate in meetings (or portions of meetings) where sensitive procurement-related information is shared.**
 - **Ask contractors for advice beyond requirements of contract, without contracting officer direction.**
 - **Use contractor-supplied information in solicitation.**



Closing Thoughts

- In 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.

• **HOW CAN WE DO BOTH?**



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